374 N.C.—No. 2 Pages 273-435

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

JULY 29, 2020

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OF
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SUPREME COURT OF NORTH CAROLINA

CASES REPORTED

FILED 1 MAY 2020

ORDERS

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taking was that of an indefinite negative easement, not a three-year restriction as NCDOT argued. Nor did the trial court abuse its discretion by excluding potentially misleading expert testimony that analogized the property restrictions after the map was recorded to those placed on property in floodplains. **Chappell v. N.C. Dep't of Transp., 273.**

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SCHEDULE FOR HEARING APPEALS DURING 2020

NORTH CAROLINA SUPREME COURT

Appeals will be called for hearing on the following dates, which are subject to change.

January 6, 7, 8
February 3, 4
March 9, 10, 11, 12
April 6, 7, 20
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CHAPPELL v. N.C. DEP'T OF TRANSP.

[374 N.C. 273 (2020)]

TED P. CHAPPELL AND SARAH CHAPPELL
v.
NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

No. 51PA19

Filed 1 May 2020

1. Eminent Domain—inverse condemnation—quick-take procedure by NCDOT—timeliness of filing

In an inverse condemnation action filed by homeowners after the N.C. Department of Transportation (NCDOT) filed a roadway corridor map encompassing their property, the trial court did not abuse its discretion by allowing the proceeding to continue to trial despite NCDOT having filed a motion for a permissive counterclaim to assert quick-take rights under N.C.G.S. § 136-104 (which would allow it to take title immediately to the subject property). Trial courts have broad discretion pursuant to section 136-114 to make all necessary orders and rules to carry out the purpose of the condemnation statutes, the trial court in this case did not block NCDOT's right to assert a permissive counterclaim under all circumstances, and the trial court properly took into account the length of time the proceeding had been pending (over three years) before denying NCDOT's attempt to assert its right two months prior to trial.

2. Eminent Domain—inverse condemnation—recordation of roadway corridor map—nature of taking—evidentiary rulings

In an inverse condemnation action filed by homeowners after the N.C. Department of Transportation (NCDOT) filed a roadway corridor map encompassing their property, the trial court did not abuse its discretion in its rulings regarding evidence of the parties' respective appraisers where the court correctly applied the proper measure of just compensation for a partial taking pursuant to N.C.G.S. § 136-112—the difference between the fair market value of the property before the map was recorded and after—and allowed only the testimony that was in accordance with that measure, after determining that the nature of the taking was that of an indefinite negative easement, not a three-year restriction as NCDOT argued. Nor did the trial court abuse its discretion by excluding potentially misleading expert testimony that analogized the property restrictions after the map was recorded to those placed on property in floodplains.

3. Eminent Domain—inverse condemnation—recordation of roadway corridor map—fair market value—expert testimony

In an inverse condemnation action filed by homeowners after the N.C. Department of Transportation (NCDOT) filed a roadway corridor map encompassing their property, the trial court did not abuse its discretion by allowing the homeowners' appraiser to testify that the fair market value of the property was zero after the map was recorded where evidence was presented that there was no market at all for the property in that geographic area based on the effect of the map, even though the homeowners were able to continue using their property.

4. Eminent Domain—inverse condemnation—recordation of roadway corridor map—jury instructions—consideration of project once completed

In an inverse condemnation action filed by homeowners after the N.C. Department of Transportation (NCDOT) filed a roadway corridor map encompassing their property, any error in the trial court's instruction to the jury to consider the proposed highway project in its completed state when determining the amount of just compensation—where the nature of the taking was an indefinite negative easement and not similar to a fee simple taking—would not have impacted the result and therefore was not prejudicial where the evidence supported the jury's verdict on fair compensation.

5. Eminent Domain—inverse condemnation—Map Act—recordation of roadway corridor map—compensation for taxes paid

In an inverse condemnation action filed by homeowners after the N.C. Department of Transportation (NCDOT) filed a roadway corridor map encompassing their property, the trial court properly took into account the taxes paid by the homeowners—on property that essentially had no fair market value after the map was recorded—when considering the amount of compensation due the homeowners.

6. Eminent Domain—inverse condemnation—pre-judgment interest—prudent investor standard—appropriate interest rate

In an inverse condemnation action filed by homeowners after the N.C. Department of Transportation (NCDOT) filed a roadway corridor map encompassing their property, the trial court erred in applying a compounded interest rate of 8% per annum to the value of both the 1992 and 2006 takings when determining pre-judgment interest, because this method essentially combined two allowable

methods rather than choosing between them. A party may choose between a presumptively reasonable statutory rate pursuant to N.C.G.S. § 24-1, or rebut that rate with a prudent investor rate compounded, if compounded rates would have been available. Further, the trial court erred by basing its decision on a non-diversified prudent investor's investment portfolio. The issue was remanded to determine the appropriate interest rate.

Appeal pursuant to N.C.G.S. § 7A-27(b) from a final judgment entered on 3 July 2018 and an amended final judgment entered on 11 July 2018 by Mary Ann Tally, Superior Court Judge, Cumberland County. On 11 June 2019, pursuant to N.C.G.S. § 7A-31(a) and (b)(2), the Supreme Court granted defendant's petition for discretionary review prior to determination by the Court of Appeals. Heard in the Supreme Court on 9 December 2019.

Yarborough, Winters & Neville, P.A., by Garris Neil Yarborough and H. Addison Winters; and Hendrick, Bryant, Nerhood, Sanders & Otis, LLP, by Matthew Bryant and T. Paul Hendrick, for plaintiff-appellees.

Cranfill, Sumner & Hartzog, by George B. Autry Jr., Stephanie Hutchins Autry, and Jeremy P. Hopkins, for amicus curiae Owners' Counsel of America.

Shiloh Daum and B. Joan Davis for amicus curiae North Carolina Advocates for Justice.

Joshua H. Stein, Attorney General by James M. Stanley, Alexandra Hightower, and William A. Smith, Assistant Attorneys General; Teague, Campbell Dennis & Gorham, by Jacob H. Wellman and Matthew W. Skidmore; and Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, LLP by Steven Sartorio and William H. Moss, for the defendant-appellant.

EARLS, Justice.

Ted and Sarah Chappell first moved to the Raeford Road property in Fayetteville that is at issue in this case in 1962, living there as tenants and raising their family. In 1985, they purchased a house on the property and approximately 2.92 acres of land. Two years later, the North Carolina General Assembly adopted the Roadway Corridor Official Map Act, Act

of Aug. 7, 1987, ch. 747, sec. 19, 1987 N.C. Sess. Laws 1520, 1538–43, [hereinafter Map Act] (codified as amended N.C.G.S. §§ 136-44.50–44.54 (2017)). In 1992 and 2006, various portions of the Chappells' property were designated as within a roadway corridor pursuant to that statute. On 5 December 2014, the Chappells filed an inverse condemnation complaint against the North Carolina Department of Transportation (hereinafter NCDOT) seeking compensation for the taking of their property caused by NCDOT's recording of a Roadway Corridor Official Map that encompassed part of their property. Following a trial in 2018, a final judgment was issued awarding the Chappells $137,247 for the 1992 taking and $6,139 for the 2006 taking, both with pre-judgment interest at 8% compounded annually, along with reimbursement of property taxes paid, attorney's fees, costs, disbursements, expenses, and expert witness fees.

On direct appeal, pursuant to N.C.G.S. § 7A-27(b), prior to determination by the Court of Appeals, NCDOT raises four issues alleging error by the trial court. First, NCDOT contends the trial court erroneously characterized the nature of the taking in this case as the equivalent of a fee simple taking and therefore instructed the jury to consider "the project in its completed state" as if the road already had been built when, in fact, the taking was much more limited in nature. According to NCDOT, this mischaracterization of the taking also led the trial court to make erroneous evidentiary rulings concerning what expert appraisal testimony would be excluded and what would be admitted.

Second, NCDOT argues that the trial court erred in adding the Chappells' discounted property taxes to the jury's award of just compensation, thus misinterpreting this Court's directive in *Kirby v. N.C. Dep't of Transp.*, 368 N.C. 847, 786 S.E.2d 919 (2016), that a trier of fact in these cases must determine the value of the loss, taking into account "any effect of the reduced *ad valorem* taxes." *Kirby*, 368 N.C. at 856, 786 S.E.2d at 926. The third issue raised by NCDOT is that the trial court erred in its use of an equity investment strategy to base its calculation of pre-judgment interest on the value of the taking. Finally, NCDOT contends that the trial court erred when it refused to allow NCDOT to exercise its statutory quick-take rights to take the entire property on the eve of trial. NCDOT asks us to vacate the trial court's judgment and remand for a new trial and additional post-judgment proceedings.

Addressing each of these issues, we first hold that as a threshold matter, there was no error in the trial court's exercise of its discretion to proceed to trial on the Chappells' inverse condemnation complaint notwithstanding NCDOT filing a motion for a permissive counterclaim

to assert its quick-take rights on the eve of trial. Second, we hold that any error in the trial court's characterization of the taking was harmless in light of the evidence in this case. Third, on the facts of this case, the trial court's treatment of the reduced property taxes was consistent with this Court's instruction in *Kirby*. Finally, we reverse the portion of the trial court's order concerning the proper evaluation of the pre-judgment interest rate because it was contrary to this Court's precedents, and we remand for further proceedings to apply a pre-judgment interest rate consistent with our prior cases.

I. Facts

The parties stipulated that the Chappells owned the property at issue along Raeford Road in Cumberland County, with no known encroachments adversely impacting the property prior to the takings at issue here. Between 1985 and 1992, the Chappells put a new roof on the home, remodeled the bathrooms, updated the wiring, and dug a well. On 29 October 1992, in furtherance of a project to build the Fayetteville Outer Loop, NCDOT recorded a Roadway Corridor Official Map pursuant to the Map Act with the Cumberland County Register of Deeds, which covered approximately .58 acres of plaintiffs' property. (Hereinafter the 1992 Map). Although this was only roughly twenty percent of the property's total land area, the 1992 Map showed the right of way line of the road going through the middle of the Chappells' house, a two-story, single-family home. On 6 June 2006, a second map was filed by defendant, expanding the area of plaintiffs' property covered by the corridor by an approximately 1.67 additional acres. (Hereinafter the 2006 Map).

Pursuant to the Map Act, property owners were prevented from developing or subdividing land within the protected corridor without approval from NCDOT. *See* N.C.G.S. §§ 136-44.51–44.53 (2017). *See also*, *Kirby*, 358 N.C. at 849–50, 786 S.E.2d at 921–22 (describing in detail the Map Act's restrictions, variances, and advance acquisition provisions). However, the Map Act did not permit NCDOT to physically enter or otherwise alter land or buildings in the proposed highway corridor. Landowners, including the Chappells, continued to have the right to use their property in any way that did not require a building permit or subdivision plat, and could sell or otherwise transfer rights to the property subject to the Map Act restrictions. They retained the right to lease or rent the property to others. The Chappells continued to live on their property until 2016.

The Chappells' expert appraiser testified at trial that the market value of their property in 1992, immediately before the Map Act taking,

was $144,888, and the market value immediately after the taking was $7,641. In 2006, the market value of their property immediately before the second Map Act taking was $11,268, and the value immediately after the taking was $5,129. Thus, in his expert opinion, the damages suffered by the Chappells for the Map Act takings of their rights to develop their property were $137,247 in 1992 and $6,139 in 2006. Another real estate expert for the Chappells testified that there was no market for any of the properties in the 1992 corridor map area because there were plenty of alternative properties for sale in Cumberland County that were not encumbered, and prospective buyers would not "want to buy something that does not work for the purpose that its designed." Similarly, there was no market for any real estate within the corridor map that was filed on 6 June 2006.

NCDOT did not present evidence for the jury in this case. The trial court granted the Chappells' motion in limine to exclude from evidence any expert opinion based on a variety of assumptions, such as assumptions about the duration of the Map Act restrictions or actions the Chappells could take to trigger condemnation of the property. Significantly, the trial court also excluded "[a]ny opinion on the value of the property based on the assumption that there is a market for the property in the corridor at fair market prices . . . " The trial court further excluded "any evidence concerning T.B. Harris, Jr. & Associates' after value appraisal of the Plaintiffs' property," and denied NCDOT the ability to cross-examine the Chappells' appraiser "as to the value of continued use, possession, [and] control of the value of the property." Having concluded that NCDOT's expert appraisers failed to comply with the definition of damages as set out in *Kirby* and further failed to meet the test for expert testimony under Rule 702 of the North Carolina Rules of Evidence, the trial court excluded any testimony from NCDOT's proposed expert witnesses.

Following the jury's verdict as to the amount of just compensation that the Chappells are entitled to recover for NCDOT's Map Act takings on 29 October 1992 and 6 June 2006, the trial court issued a final judgment addressing three additional issues. The trial court awarded the Chappells their attorneys' fees, costs, disbursements, expenses, and expert witnesses fees; required NCDOT to pay all of the ad valorem taxes actually paid by the Chappells from 2002 to 2016, the years for which evidence was presented as to the taxes they paid on their property; and awarded pre-judgment interest on the values of the two takings at the compounded rate of 8% per annum.

II. NCDOT's Quick-Take Rights

[1] We first address the ruling, made by the trial court prior to trial, denying NCDOT the right to exercise its statutory quick-take rights under N.C.G.S. § 136-104 (2019) to take title immediately to the entire property. The Chappells filed this inverse condemnation action raising constitutional claims and a declaratory judgment claim on 5 December 2014. NCDOT answered the complaint on 6 February 2015, denying that a taking had occurred and seeking dismissal of the action on several grounds. Asserting a total of eighteen defenses, NCDOT alleged that the Chappells lacked standing, that the court lacked jurisdiction, that the claims were not ripe, that administrative remedies had not been exhausted, that damages were not mitigated, and that plaintiffs' claims were barred by estoppel. On 9 October 2015, the trial court stayed the case, on motion by the Chappells, pending this Court's ruling in *Kirby*, which was subsequently decided on 10 June 2016. It was not until 1 February 2018, as the parties and the trial court were preparing to go to trial on the Chappells' claims, that NCDOT sought to acquire full rights to the Chappells' property through a quick-take action asserted as a permissive counterclaim. The trial court ruled, at a hearing in open court on 1 February 2018, that NCDOT could file a condemnation action as a permissive counterclaim in the present action, but because the case was already calendared to go to trial on 9 April 2018, a quick-take complaint that immediately transfers title to the property would not be permitted.

The appropriate standard of review here is abuse of discretion because the General Assembly has granted trial courts broad discretion to conduct condemnation proceedings in the manner that will best achieve the purposes of the statute. Recognizing the uniqueness of the quick-take procedure, the statute provides that:

> [i]n all cases of procedure under this Article where the mode or manner of conducting the action is not expressly provided for in this Article or by the statute governing civil procedure or where said civil procedure statutes are inapplicable the judge before whom such proceeding may be pending shall have the power to make all the necessary orders and rules of procedure necessary to carry into effect the object and intent of this Chapter and the practice in such cases shall conform as near as may be to the practice in other civil actions in said courts.

N.C.G.S. § 136-114 (2019). The procedure to follow when the NCDOT seeks to acquire fee simple rights to property within a Map Act corridor

that is already the subject of a pending inverse condemnation action is not specified in Chapter 136. Therefore, the trial court needed to make all the necessary orders and rules to carry out the purpose of the statute. *Id.*, *see also*, *Vaughan v. Mashburn*, 371 N.C. 428, 433, 817 S.E.2d 370, 374 (2018) (denial of a motion to amend a pleading is reviewed for abuse of discretion). In general, an "[a]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citing *State v. Parker*, 315 N.C. 249, 337 S.E.2d 497 (1985)). Thus, the question here is whether the trial court's ruling was unsupported by reason or manifestly arbitrary. We have previously held that delay in seeking to amend a pleading, and particularly where it causes prejudice to a party, can justify a decision to deny the amendment. *See News & Observer Publ'g Co. v. Poole*, 330 N.C. 465, 485, 412 S.E.2d 7, 19 (1992) ("Among proper reasons for denying a motion to amend are undue delay by the moving party and unfair prejudice to the non-moving party.")

NCDOT argues that the trial court's decision to deny it the right immediately to obtain title to the Chappells' property once NCDOT complied with the provisions of N.C.G.S. §§ 136-103, -104 (2019), by identifying the property being taken, estimating just compensation, and depositing that amount in court, was an abuse of discretion because the statute mandates that in those circumstances the title transfers immediately to NCDOT, and the trial court has no discretion to deny possession to the department. Under the plain language of the statute, NCDOT contends, the trial court had no authority to deny title and to rule otherwise would allow a single property owner to "stop a highway project in its tracks by simply declining to resolve his or her Map Act claim."

To be clear, the trial court's 1 February 2018 ruling in open court, later entered by written order dated 16 February 2018, did not deny NCDOT the right to assert a permissive counterclaim under any and all circumstances. Indeed, the trial court stated that "a counterclaim in an inverse condemnation case is the appropriate manner by which the Department of Transportation may seek to acquire additional rights in the property subject to the ongoing, prior litigation." What the trial court denied was the right to assert the counterclaim as presented because, as drafted, it appeared to be an "attempt to convert this inverse condemnation action into a direct condemnation action." Thus, the issue here is the proper procedure in this particular case, not the denial of NCDOT's statutory right to obtain title to the property and ultimately, to build the Fayetteville Outer Loop. Because Chapter 136 of the North

Carolina General Statutes provides no manner or mode for conducting a quick-claim direct condemnation action during a pending inverse condemnation action, the judge before whom the inverse condemnation action is pending is in the best position to determine how the matter should proceed.

Here, the trial court's order was based on the length of time the inverse condemnation proceeding had been pending, the procedure the court followed in a prior similar case, and its review of the specific language of the proposed permissive counterclaim. From the record in this case, it appears the trial court was concerned to prevent the derailment, immediately before trial, of the Chappells' efforts to obtain just compensation for the takings they experienced in 1992 and 2006. The trial court did not abuse its discretion, granted by N.C.G.S. § 136-114, in ruling that any permissive counterclaim filed by NCDOT in this case could not be interposed at the last minute to prevent a trial on the Chappells' inverse condemnation claim. On remand, NCDOT can assert its quick-take action, and the fair market value of the Chappells' remaining property interest as of the date of the final judgment has been established by the jury's verdict here.

III. The Nature of the Taking

A. Standard of Review

A trial court's conclusions of law are reviewed *de novo*, including legal conclusions contained in jury instructions. *See Beroth Oil Co. v. N.C. Dep't of Transp.*, 367 N.C. 333, 338, 757 S.E.2d 466, 471 (2014); *see also Akzona, Inc. v. Southern Ry. Co.*, 314 N.C. 488, 494, 344 S.E.2d 759, 763 (1985) (reversing trial court for improper jury instructions on inverse condemnation and remanding for new trial). Generally, a trial court's rulings about whether to admit or exclude expert testimony are reviewed for abuse of discretion. *N.C. Dep't of Transp. v. Mission Battleground Park, DST*, 370 N.C. 477, 480, 810 S.E.2d 217, 220 (2018). Among other ways, an abuse of discretion may occur when the trial court misapprehends the applicable law. *See, e.g.*, *In re Estate of Skinner*, 370 N.C. 126, 139-40, 404 S.E.2d 449, 457-58 (2017).

To set aside a verdict, any errors made by the trial court must also be shown to be prejudicial. Rule 61 of the North Carolina Rules of Civil Procedure provides that:

> No error in either the admission or exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by any of the parties is ground for

> granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action amounts to the denial of a substantial right.

N.C.G.S. § 1A-1, Rule 61. In the context of legally erroneous jury instructions, "it must be shown that 'a different result would have likely ensued had the error not occurred.' " *Word v. Jones ex rel. Moore*, 350 N.C. 557, 565, 516 S.E.2d 144, 148 (1999) (quoting *Responsible Citizens in Opposition to the Flood Plain Ordinance v. City of Asheville*, 308 N.C. 255, 271, 302 S.E.2d 204, 214 (1983)) (granting a new trial where the Court was unable to say as a matter of law that plaintiff was not prejudiced by erroneous jury instruction on defense of sudden incapacitation); *see also*, *N.C. State Highway Comm'n v. Gasperson*, 268 N.C. 453, 456, 150 S.E.2d 860, 863 (1966) (reversing jury verdict and remanding for new trial to determine just compensation for highway easement where "the challenged instruction was erroneous and prejudicial.").

B. Valuing an Indefinite Negative Easement

[2] NCDOT argues that the trial court fundamentally mischaracterized the nature of the taking when NCDOT recorded a corridor map under the Map Act that encompassed the Chappells' property. The trial court found that the nature of the taking was a negative easement that never expired and specified that the only permissible proof of damages was a calculation of the difference between the value of the Chappells' property before the corridor maps were recorded and the value of the property after recordation. NCDOT contends that the Chappells were allowed to argue that the taking was a fee simple taking; that the trial court improperly precluded the introduction of any evidence to the contrary, including evidence of the Chappells' continued use and enjoyment of the property; that the jury was improperly precluded from hearing that the Chappells could be relieved from the Map Act's restrictions after three years; and that the jury was erroneously instructed that "in arriving at the fair market value of the property subject to the Defendant's restrictions on its use immediately after the taking, you should contemplate the project in its completed state and any damage to the remainder due to the use to which the part appropriated may, or probably will, be put."

Instead, NCDOT sought to introduce evidence of the value of the negative easement that restricted the Chappells' right to improve, develop or subdivide their property for three years, through the expert

opinion of an appraiser who calculated that value to be $425 for the 1992 restrictions and $12,000 for the 2006 restrictions. After the trial court ruled that NCDOT's appraiser could not render an opinion based on the three-year period established by the statute,[1] the appraiser revised his calculations and concluded that the value of the 1992 restrictions was $1,250 and $21,050 for the 2006 restrictions. NCDOT's appraiser did not seek to calculate the fair market value of the property before and after the Map Act corridor maps were recorded and had no opinion on the difference in market value. The question NCDOT asks is whether the trial court's alleged mischaracterization of the nature of the taking led the court to erroneously exclude its appraiser's testimony, improperly allow the Chappells' appraiser to testify, and erroneously instruct the jury.

Our answer is that what matters is whether the trial court correctly applied the law concerning how just compensation is measured, not the label given by the trial court or the parties to the taking that occurred. The nature of the taking impacts the fair market value of the property before and after the taking, but the touchstone is fair market value of the property. The trial court's evidentiary rulings concerning the expert testimony here were not an abuse of discretion because they were based on a correct understanding of the proper measure of just compensation.[2]

The General Assembly has specified how damages are to be measured in inverse condemnation proceedings in these circumstances.

> Where only a part of a tract is taken, the measure of damages for said taking shall be the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking, with consideration being given to any special or general benefits resulting from the utilization of the part taken for highway purposes.

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1. The Map Act provided that a property owner could seek relief from the Act's restrictions by submitting an application for a building permit or subdivision plat, which triggered a three-year period during which NCDOT would have to either approve the application or move to acquire the property in fee simple. *See* N.C.G.S. §136-44.51(b) (2017). If the department took no action within the three-year period, the restrictions ended and the property could be treated as unencumbered. *Id.*

2. A trial court's ruling on the admissibility of expert testimony will not be reversed on appeal absent a showing of abuse of discretion, even when the exclusion of expert testimony determines the outcome of the case. *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016) (citing *GE v. Joiner*, 522 U.S. 136, 142-43, 118 S. Ct. 512, 517 (1997)).

N.C.G.S. § 136-112(1) (2019).[3] *See also*, *N.C. Highway Comm'n v. Hettiger*, 271 N.C. 152, 156, 155 S.E.2d 469, 472 (1967) (identifying that this statute prescribes the rule for determining what constitutes just compensation); *Gallimore v. Highway Comm'n*, 241 N.C. 350, 353, 85 S.E.2d 392, 395 (1955) (holding that just compensation is the fair market value of the property before and after the taking of a portion for highway purposes).

Kirby holds that a Map Act recordation effected an "indefinite restraint on fundamental property rights" which restricts the property owners' rights to improve, develop, and subdivide their property for an indefinite period of time. 368 N.C. at 855–56, 786 S.E.2d at 925–26. The value of the loss of those rights is to be measured "by calculating the value of the land before the corridor map was recorded and the value of the land afterward, taking into account all pertinent factors, including the restriction on each plaintiff's fundamental rights, as well as any effect of the reduced *ad valorem* taxes." *Kirby*, 368 N.C. at 856, 786 S.E.2d at 926 (citing *Natahala Power & Light Co. v. Moss*, 220 N.C. 200, 205–06, 17 S.E.2d 10, 13–4 (1941) and *Beroth*, 367 N.C. at 343–44, 757 S.E.2d at 474–75.). Thus, the relevant determination when calculating just compensation for a taking that involves less than the entire parcel of property starts with the fair market value of the entire property before the taking and the fair market value of what remains after the taking. This is true whether the taking is an indefinite negative easement, as in the case of Map Act takings, or involves some other taking for public use. By eminent domain, the state may take "an easement, a mere limited use, leaving the owner with the right to use in any manner he may desire so long as such use does not interfere with the use by the sovereign for the purpose for which it takes, or it may take an absolute, unqualified fee, terminating all of defendant's property rights in the land taken." *Morganton v. Hutton & Bourbonnais Co.*, 251 N.C. 531, 533, 112 S.E.2d 111, 113 (1960) (citations omitted). The property owner's damages are calculated on the basis of before and after fair market values in each instance.

While it speaks to the exclusive measure of damages, the statute does not restrict expert real estate appraisers with regard to the method they use to determine fair market value. *Bd. of Transp. v. Jones*, 297 N.C.

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3. The General Assembly enacted N.C.G.S. § 136-112 as a part of Section 2, Chapter 1025, of the Session Laws of 1959. 1959 N.C. Sess. Laws 1046, 1051. The rule, as to the measure of damages stated there, "is in accord with that adopted and stated by this Court in numerous decisions prior to the adoption of the 1959 Act." *N.C. State Highway Comm'n v. Gasperson*, 268 N.C. 453, 455, 150 S.E.2d 860, 862 (1966) (citing *Robinson v. Highway Comm'n*, 249 N.C. 120, 105 S.E. 2d 287 (1958)).

436, 438, 255 S.E.2d 185, 187 (1979). "Methods of appraisal acceptable in determining fair market value include: (1) comparable sales, (2) capitalization of income, and (3) cost. While the comparable sales method is the preferred approach, the next best method is capitalization of income when no comparable sales data are available." *Dep't of Transp. v. M.M. Fowler, Inc.*, 361 N.C. 1, 13 n.5, 637 S.E.2d 885, 894 n.5 (2006) (citing 5 Julius L. Sackman et al., *Nichols on Eminent Domain* § 19.01, 19-2 (rev. 3d ed. 2006) and 4 Julius L. Sackman et al., *Nichols on Eminent Domain* § 12B.08, 12B-47 to -48 (rev. 3d ed. 2006)); *see also*, *Templeton v. State Highway Comm'n*, 254 N.C. 337, 339, 118 S.E.2d 918, 920 (1961) (allowing the admission of "[a]ny evidence which aids . . . in fixing a fair market value of the land and its diminution by the burden put upon it").

NCDOT was entitled to present evidence of the before and after fair market value of the Chappells' property using acceptable methods of appraisal, but only methods using factors that legally can be considered. In *Dep't of Transp. v. M.M. Fowler, Inc.*, the Court reversed and remanded for a new trial because the property owner's appraiser based their fair market value of the property solely on the capitalized alleged lost business profits, which we held was not admissible evidence because the lost business profit from a business conducted on the property is not a compensable loss. *M.M. Fowler, Inc.*, 361 N.C. at 15, 637 S.E.2d at 895. In that case, we explained:

> During a proceeding to determine just compensation in a partial taking, the trial court should admit any relevant evidence that will assist the jury in calculating the fair market value of property and the diminution in value caused by condemnation. *Abernathy v. S. & W. Ry. Co.*, [ ]150 N.C. 97, 108–09, 63 S.E. 180, 185 (1908). Admission of evidence that does not help the jury calculate the fair market value of the land or diminution in its value may "confuse the minds of the jury, and should be excluded." *Id.* [ ] at 109, 63 S.E. at 185. In particular, specific evidence of a landowner's noncompensable losses following condemnation is inadmissible. *Templeton v. State Highway Comm'n*, 254 N.C. 337, 339–40, 118 S.E.2d 918, 920–21 (1961) (finding trial court erred in admitting evidence of the cost of silt and mud removal because "it [was] possible that the jury could have gotten the impression that the removal . . . was compensable as a separate item of damage").

M.M. Fowler, Inc., 361 N.C. at 6–7, 637 S.E.2d at 890 (third and fourth alteration in original). Therefore, an opinion concerning a property's fair

market value is inadmissible if it materially relies on factors that legally cannot be considered. Moreover, an expert's opinion must be reasonably reliable to be admissible. *See Dep't of Transp. v. Haywood Cty.*, 360 N.C. 349, 352–53, 626 S.E.2d 645, 647 (2006) (trial court properly excluded appraisers' expert testimony because it "lacked sufficient reliability").

Applying these principles to this case, the trial court did not abuse its discretion to rule that NCDOT's expert appraiser's opinion, to the extent that the expert sought to value the rights that remained to the property owner after the taking based on a three-year temporary negative easement, was not admissible. That testimony assumed a three-year negative easement when this Court previously held that a Map Act recording creates an "indefinite restraint on fundamental property rights." *Kirby*, 368 N.C. at 855–56, 786 S.E.2d at 925-26. *Cf. North Carolina State Highway v. Black*, 239 N.C. 198, 205, 79 S.E.2d 778, 784 (1954) (compensation for a perpetual easement cannot be based on an assumption that it will be abandoned).

NCDOT's expert appraiser testified at the motions hearing that lacking any comparable sales and assuming an indefinite negative easement, he based a subsequent valuation of the property on floodplain property values because in his view the restrictions imposed by a Map Act recordation are similar to the restrictions on properties in a floodplain. The trial court ultimately ruled that the floodplain analogy was not a proper basis for determining the fair market value of the property after the Map Act taking. The trial court's ruling was based on the fact that the floodplain property used in the appraisal was in and around Mecklenburg County, "not anywhere near Cumberland County," and that the floodplain designation is an exercise of police power, unlike the Map Act taking which is an exercise of eminent domain. The court's decision here to exclude the testimony as unreliable and potentially misleading to the jury because "there is no reliable reason to choose flood plain property as the analogous property" was not an abuse of discretion. *See*, *e.g.*, *Gallimore v. State Highway & Pub. Works Com.*, 241 N.C. 350 354, 85 S.E.2d 392, 396 (1955) ("Any evidence which aids the jury in fixing a fair market value of the land, and its diminution by the burden put upon it, is relevant and should be heard; any evidence which does not measure up to this standard is calculated to confuse the minds of the jury, and should be excluded.").

Lacking any sales of comparable property from which to determine fair market value, there remained two other methods of assessing the fair market value of the property, the cost approach and the income capitalization approach. *M.M. Fowler*, *Inc.*, 361 N.C. at 13 n.5,

637 S.E.2d at 894 n.5. Some of the evidence that NCDOT sought to introduce concerning the value of the property after the Map Act recordings, such as the fact that the Chappells continued to live in the home until 2016, might have been admissible if the income capitalization approach to the value of the home had been employed by NCDOT's appraisers.[4] However, there was no evidence from a NCDOT appraiser concerning the fair market value of the property after the 1992 and 2006 takings based on a cost approach or income capitalization approach to valuation. Thus, it was not an abuse of discretion for the trial court to exclude testimony that did not relate to one of the three appropriate methods of determining fair market value.

[3] Citing *Duke Power Co. v. Rogers*, 271 N.C. 318, 320, 156 S.E.2d 244, 247 (1967) and other precedent establishing that it is error to instruct the jury to award damages based on a fee simple taking where the condemning authority takes a lesser interest in the property, NCDOT further argues that it was error for the trial court to admit the testimony of the Chappells' appraiser. NCDOT contends that testimony improperly assumed that the highway was present on the property immediately after the filing of the corridor map, and it valued the property rights inside the corridor at zero despite the fact that the Chappells retained some rights to use the property after the takings. However, here there was ample evidence in the record, including the *voir dire* testimony of NCDOT's own appraisers, that there was no market for the Chappells' property once the 1992 corridor map was recorded. Whether one assumes the road is built, calls the taking similar to a fee simple taking, or gives the taking some other name, the fact that there was evidence of no market whatsoever for the property, in other words, that no one wanted to buy a house in the Outer Loop corridor once the 1992 map was recorded, was a proper consideration in determining the after-taking fair market value.

It is certainly correct that Rule 702 of the North Carolina Rules of Evidence applies here. *See N.C. Dep't of Transp. v. Mission Battleground Park, DST*, 370 N.C. 477, 485, 810 S.E.2d 217, 223 (2018) (directing on remand, with regard to a licensed real estate broker, "the superior court should decide in the first instance whether his testimony about fair market value is admissible under Rule 702."). However, we only overturn the trial court's ruling on whether to admit or exclude expert testimony where there has been an abuse of discretion. *State v. McGrady*, 368 N.C. at 893, 787 S.E.2d at 11 ("The standard of review remains the same

4. The fact that the Chappells lived in the property arguably could be relevant to the habitability of the premises and its rental value.

whether the trial court has admitted or excluded the testimony …"). In this case it was not an abuse of discretion for the trial court to allow the Chappells' appraiser to testify concerning the fair market value of their property after the taking because that expert opinion was based on evidence that there was, in fact, no market whatsoever for the property.

[4] With regard to the jury instructions, NCDOT argues the trial court erred in twice instructing that the jury should "contemplate the project in its completed state and any damage to the remainder due to the use to which the part appropriated may, or probably will, be put." The trial court based this instruction on the language of *Dep't of Transp. v. Bragg*, 308 N.C. 367, 370, 302 S.E.2d 227, 229 (1983), cited in the footnote to the pattern jury instruction. Again citing *Rogers*, NCDOT contends that it was reversible error to instruct the jury to award damages based on a fee simple taking where a lesser taking occurred. *See Rogers*, 271 N.C. at 320, 156 S.E.2d at 247.

Bragg involved the taking of a portion of the landowners' property for the purpose of widening a road pursuant to N.C.G.S. § 136-104, immediately vesting title with NCDOT. In the process of widening the road, a new drainage pattern caused additional damage to the remaining property, and the issue was whether evidence of this damage caused by the water diversion could be considered by the jury in assessing just compensation. *Bragg*, 308 N.C. at 370, 302 S.E.2d at 229. In those circumstances, it was appropriate for the jury to consider as an element of just compensation any evidence of damage to the landowners' remaining property.[5]

In contrast, under the Map Act, the indefinite negative easement created by recording a corridor map does not by itself result in the building or widening of a road. While it may have been erroneous to include this jury instruction given the facts of this case, to the extent that the taking here was a negative easement and not similar to a fee simple taking of the property, the error was not prejudicial because it could not have impacted the jury's determination of just compensation. The only evidence of the fair market value of the Chappells' property before and after

5. Indeed, the Court in *Bragg* concluded that the jury should consider the project as though completed in arriving at just compensation because "when, as here, the Department has initiated a partial taking under N.C.G.S. § 136-103 and trial on the issue of damages has not yet occurred, principles of judicial economy dictate that the owners of the taken land may allege a further taking by inverse condemnation in the ongoing proceedings." *Bragg*, 308 N.C. at 370 n.1, 302 S.E.2d at 230 n.1. Under a Map Act recording, title has not transferred, a road is not built, and drainage damages have not occurred.

the 1992 and 2006 takings was the evidence provided by the Chappells' appraiser. There was no evidence of an alternative fair market valuation on a cost basis or income capitalization basis that could have informed the jury's verdict. Therefore, regardless of the trial court's instruction regarding the road being built, the evidence admitted at trial supported the jury's verdict on fair compensation. The error, if any, would not have impacted the result in this particular trial.

IV. Property Taxes

[5] The Map Act initially reduced tax rates for impacted unimproved properties, and in 2011, the General Assembly further provided that designated properties in protected corridors would be assessed lower property taxes, being taxed at 20% of appraised value for unimproved property and 50% of the appraised value for improved property. *See* An Act to Reduce the Property Tax Owed For Improved Property Inside Certain Roadway Corridors, S.L. 2011-30, 2011 N.C. Sess. Laws 42 (codified at N.C.G.S.. §§ 105-277.9, -277.9A (2019)). In *Kirby*, this Court directed that the trier of fact should determine the value of the property after the corridor map was recorded, "taking into account . . . any effect of the reduced *ad valorem* taxes." *Kirby*, 368 N.C. at 849, 786 S.E.2d at 921. The trial court interpreted this to mean that the Chappells should be compensated for the actual *ad valorum* taxes they paid following the taking, while NCDOT contends that the amount of just compensation should be offset by the reduced property taxes because the reduction in taxes was intended to be partial compensation for the taking. NCDOT further argues that owners can only be reimbursed their property taxes when there is a fee simple taking. *See* N.C.G.S.§ 136-121.1 (2019).

However, in this case, where the evidence was that the property essentially had no fair market value once the 1992 corridor map was recorded, and there was no other evidence of the fair market value of the property assessed using a cost approach or an income capitalization approach, the Chappells were effectively paying taxes on property that had no value. Thus, it was appropriate, following *Kirby*, for the trial court to take into account the effect of the reduced *ad valorem* taxes in the way that it did, and compensate the Chappells for the actual taxes they paid at a time when their property had virtually no fair market value.

V. Pre-Judgment Interest

[6] Plaintiffs in inverse condemnation proceedings may seek interest on the judgment awarded by a jury as damages "at the legal rate on said amount from the date of the taking to the date of the judgment." N.C.G.S.. § 136-113 (2015). At the time this action was filed, the legal

rate of interest for the purposes of this statute was set by N.C.G.S. § 24-1 (2015) at 8% per annum.[6] The landowner may rebut this presumptively reasonable rate through the introduction of evidence of prevailing market interest rates. *Lea Co. v. N.C. Bd. of Transp.*, 317 N.C. 254, 261 345 S.E.2d 355, 359 (1986). The amount of additional compensation for a delay in payment in inverse condemnation actions is the "prudent investor" standard, defined as the rate which would have been earned by "a reasonably prudent person investing funds so as to produce a reasonable return while maintaining safety of principal." *Lea*, 317 N.C. at 262, 345 S.E.2d at 360 (citations omitted). Even more specifically, the *Lea* Court assumed that a prudent investor would typically diversify her portfolio, and therefore the trial court must "consider prevailing rates, during the period of delay, for investments of varying lengths and risk," and such investments typically include "short, medium, and long-term government and corporate obligations." *Id.*, 317 N.C. at 263, 345 S.E.2d at 360 (citations omitted). In addition, *Lea* held that "[s]ince this Court had now adopted the 'prudent investor' standard, compound interest should be allowed for delayed payment in condemnation cases if the evidence shows that during the pertinent period the 'prudent investor' could have obtained compound interest in the market place." *Id.*, 317 N.C. at 264, 345 S.E.2d at 361.

In this case, the parties stipulated that 8% simple interest is presumptively reasonable and that it was proper for the trial court to rule on the issue of interest. The trial court heard testimony from experts in finance and economics offered by both parties and based on that evidence, made relevant findings of fact and conclusions of law. Specifically, the trial court found that compound rates of return were available to the Chappells from 1992 to the date of the judgment, and that a compound rate of return of 8% per annum would put the Chappells in as good a position as they would have been if NCDOT had not taken their property.

The Chappells' economist, found to be credible by the trial court, testified that a 60% stock/40% bond portfolio mix "would satisfy the prudent investor goal of providing a reasonable return while maintaining the safety of principal." Based on that mix, his testimony was that the compound rate of return from the date of the 1992 taking to the present was 8.52%, and the compound rate of return from the date of the 2006

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6. N.C.G.S. § 136-113 was amended in 2016 to tie the legal rate of interest in condemnation proceedings to the prime lending rate instead of the 8% set in N.C.G.S. § 24-1. However, because that amendment post-dated the filing of this action, it does not apply here.

taking to the present would be 7.5%. The trial court concluded that it was appropriate to apply a compounded interest rate of 8% per annum to the value of both the 1992 and 2006 takings from the date of each taking to the entry of final judgment.

The problem with the trial court's analysis is that if the 8% interest is based on the legal rate of 8% per annum simple interest set by N.C.G.S. § 24-1, deemed presumptively reasonable and stipulated by the parties, then it was error to compound that rate because under *Lea*, a plaintiff can choose a) the statutory rate, or, b) rebut it with a prudent investor rate compounded if compounded rates would have been available, but cannot combine both methods of arriving at the appropriate interest calculation. *See*, *Lea*, 317 N.C. at 261, 345 S.E.2d at 359.

Alternatively, as seems more likely, if the trial court's compounded interest rate of 8% per annum was based on the "prudent investor" standard, then the expert testimony in this case failed to limit the type of alternative investments to interest-bearing instruments but rather assumed a portfolio of 60% equity/40% bond mix. *Lea* referenced an "interest" portfolio and "government and corporate obligations." Reading *Lea* in conjunction with this Court's opinion in *Fidelity Bank v. N.C. Dept. of Revenue*, 370 N.C. 10, 20, 803 S.E.2d 142, 150 (2017), which was not an inverse condemnation case but did hold that the term "interest" when undefined in a statute is unambiguous and means "periodic payments received by the holder of a bond," the interest rate available under the "prudent investor" standard for determining the appropriate interest rate to apply to a judgment in an inverse condemnation case must be a rate produced by debt instruments or debt obligations, such as commercial bonds or treasury bills during the relevant time period.

Therefore, the trial court erred in applying a compounded interest rate of 8% per annum based on a prudent investor's investment portfolio that included equity investments. In the absence of evidence in the record concerning what rates of return a prudent investor might have obtained from a diversified portfolio of commercial bonds and/or treasury bills, and our own inability to make factual findings, we remand to the trial court for further proceedings to determine the appropriate interest rate to apply consistent with this opinion.

VI. Conclusion

Kirby v. N.C. Dep't of Transp. established that by recording corridor maps, the NCDOT took significant and fundamental property rights from the property owners in the affected corridors. The evidence in this case showed that for the Chappells, the fair market value of their

property plummeted after the 1992 map was recorded because no one was interested in buying a house in Cumberland County that might eventually be condemned to make way for the Fayetteville Outer Loop. The trial court correctly applied the statutorily defined measure of damages for a partial taking and made evidentiary rulings consistent with what is relevant to determining fair market value. Any error in the jury instructions was harmless in light of the evidence in this case. The trial court did not err in taking into account the taxes the Chappells paid on property that had virtually no value and correctly compensated them for the actual amounts they demonstrated they paid. On remand, all parties can provide supplemental evidence to the trial court concerning the appropriate compounded interest rate to apply under the "prudent investor" standard, properly understood.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

DTH MEDIA CORPORATION, CAPITOL BROADCASTING COMPANY, INC., THE CHARLOTTE OBSERVER PUBLISHING COMPANY, AND THE DURHAM HERALD COMPANY

v.

CAROL L. FOLT, IN HER OFFICIAL CAPACITY AS CHANCELLOR OF THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, AND GAVIN YOUNG, IN HIS OFFICIAL CAPACITY AS SENIOR DIRECTOR OF PUBLIC RECORDS FOR THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL

No. 142PA18

Filed 1 May 2020

Public Records—public university—student disciplinary records—effect of federal law on state disclosure requirement

Student disciplinary records sought pursuant to the Public Records Act (PRA)—including the name of the student, the violation committed, and any sanction imposed by the university, but not the date of offense—must be disclosed as public records, despite the records also qualifying as educational records under the federal Family Educational Rights and Privacy Act (FERPA). The federal and state law were not in conflict with each other under these circumstances, and the federal law did not grant discretion to the university to determine whether the records should be disclosed. Therefore, FERPA did not operate to preempt the PRA, either through the doctrine of conflict preemption or field preemption, so as to protect from disclosure the disciplinary records at issue.

Justice DAVIS dissenting.

Justices ERVIN and EARLS join in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 from the decision of a unanimous panel of the Court of Appeals, 259 N.C. App. 61, 816 S.E.2d 518 (2018), reversing a judgment entered on 9 May 2017 by Judge Allen Baddour in Superior Court, Wake County. Heard in the Supreme Court on 27 August 2019.

Stevens Martin Vaughn & Tadych, PLLC, by Hugh Stevens and Michael J. Tadych, for plaintiff-appellees.

Joshua H. Stein, Attorney General, by Stephanie A. Brennan, Special Deputy Attorney General, and Matthew Burke, Solicitor General Fellow, for defendant-appellants.

J.D. Jones Law, PLLC, by Jonathan D. Jones for Student Press Law Center and Brechner Center for Freedom of Information, amici curiae.

Fox Rothschild LLP, by Troy D. Shelton for Victim Rights Law Center, N.C. Coalition Against Sexual Assault, National Alliance to End Sexual Violence, National Network to End Domestic Violence, and the N.C. Coalition Against Domestic Violence, amici curiae.

MORGAN, Justice.

This matter presents questions which require this Court to interpret the federal Family Educational Rights and Privacy Act (FERPA) and the North Carolina Public Records Act (the Public Records Act) in order to determine whether officials of The University of North Carolina at Chapel Hill (UNC-CH or University) are required to release, as public records, disciplinary records of its students who have been found to have violated UNC-CH's sexual assault policy. The Court of Appeals unanimously determined that such records are subject to mandatory disclosure. We affirm.

Factual and Procedural Background

This case arises out of a dispute between various news organizations and officials of UNC-CH's administration. Plaintiffs DTH Media Corporation; Capitol Broadcasting Company, Inc.; The Charlotte Observer

Publishing Company; and The Durham Herald Company (collectively, plaintiffs) are news organizations based in North Carolina which regularly report on matters regarding UNC-CH. Defendants are Carol L. Folt, the former Chancellor of UNC-CH and Gavin Young, the Senior Director of Public Records of UNC-CH (collectively, defendants). Plaintiffs brought this legal action against defendants in the defendants' official capacities for alleged violations of the Public Records Act. The Act was enacted by the North Carolina General Assembly in order to make public records readily available because they "are the property of the people." *See* N.C.G.S. §§ 132-1 to -11 (2017). Defendants contend that they are prohibited from complying with the Public Records Act in light of applicable provisions of FERPA. The parties stipulated to the following facts, which were adopted by the lower courts and utilized in their respective determinations in the controversy prior to this Court's involvement.

Since 2014, UNC-CH has adhered to its comprehensive "Policy on Prohibited Discrimination, Harassment and Related Misconduct" that includes prohibitions on, and potential punishments for, sexual-based and gender-based harassment and violence. In a letter dated 30 September 2016, plaintiffs requested, pursuant to the Public Records Act, "copies of all public records made or received by [UNC-CH] in connection with a person having been found responsible for rape, sexual assault or any related or lesser included sexual misconduct by [UNC-CH's] Honor Court, the Committee on Student Conduct, or the Equal Opportunity and Compliance Office." The letter was addressed to officials of UNC-CH, including defendant Young. In a letter dated 28 October 2016 and signed by Joel G. Curran, UNC-CH's Vice Chancellor for Communications and Public Affairs, UNC-CH expressly denied plaintiffs' request. In his letter, Vice Chancellor Curran asserted that the records requested by plaintiffs were "educational records" as defined by FERPA and were thus "protected from disclosure by FERPA."

After subsequent communications between the parties, including mediation proceedings which were conducted pursuant to N.C.G.S. § 78-38.3E, plaintiffs narrowed the scope of their request for records which were held in the custody of UNC-CH to: "(a) the name of any person who, since January 1, 2007, has been found responsible for rape, sexual assault or any related or lesser included sexual misconduct by the [UNC-CH] Honor Court, the Committee on Student Conduct, or the Equal Opportunity and Compliance Office; (b) the date and nature of each violation for which each such person was found responsible; and (c) the sanction[] imposed on each such person for each such violation." UNC-CH denied plaintiffs' revised, more limited request on 11 November

2016 during an in-person meeting, and further reiterated to plaintiffs on 18 November 2016 that the University would continue to decline plaintiffs' request for the records at issue pursuant to FERPA.

On 21 November 2016, following the continued denial of their request, plaintiffs filed a complaint and sought an order for defendants to show cause under the Public Records Act and the North Carolina Declaratory Judgments Act. *See* N.C.G.S. §§ 1-253 to -267. Plaintiffs sought in relevant part: (1) a preliminary order compelling defendants to appear and produce the records at issue; (2) an order declaring that the requested records are public records as defined by N.C.G.S. § 132-1; and (3) an order compelling defendants to permit the inspection and copying of these records, pursuant to N.C.G.S. § 132-9(a) in their capacity as public records.

Defendants filed their answer to plaintiffs' complaint and petition for the show cause order on 21 December 2016, claiming that "FERPA, a federal law that preempts the Public Records Act, strictly prohibits" the disclosure of the records at issue. More specifically, defendants asserted UNC-CH's position that

> [u]nder FERPA, the University has reasonably exercised its discretion not to release this information, because doing so would breach the confidentiality of the University's Title IX process and would interfere with and undermine that process. More specifically, disclosure of this information would deter victims from coming forward and participating in the University's Title IX process, thus preventing victims from receiving the help and support available to them through the University's Title IX process and preventing the University from learning about potential serial perpetrators, which would undermine the safety of the campus community. Additionally, disclosure of this information would permit the identification of victims by members of the campus community who know their relationship to the responsible person and by providing the responsible student motivation to reveal the name of the victim, which would lead to victims being re-traumatized. Such disclosure would deter the participation of witnesses and further impede the University's ability to render a fair, just, and informed determination, and jeopardize the safety of students found responsible during the Title IX process by placing them at risk for retribution.

Following a hearing on plaintiffs' request for declaratory judgment which was conducted on 6 April 2017, the Superior Court, Wake County entered an order and final judgment filed on 9 May 2017 which, *inter alia*, denied plaintiffs' request for a declaratory judgment in determining that defendants were not required to produce the student records requested by plaintiffs.[1] In reaching its decision, the trial court concluded that the Public Records Act does not compel the release of public records where an exception is "otherwise specifically provided by law," and agreed with defendants' position as expressed in the trial court's order and final judgment, that

> [i]n 20 U.S.C. § 1232(b)(6), FERPA grants the University the discretion to determine whether to release (1) the name of any student found 'responsible' under University policy of a 'crime of violence' or 'nonforcible sex offense,' (2) the violation, and (3) the sanction imposed. The University may disclose (but is not required to disclose) this information only if the University determines that the student violated the University's rules or policies.

In applying principles enunciated in the United States Constitution and pertinent cases of the Supreme Court of the United States, the trial court entered conclusions of law that the doctrines of both field preemption and conflict preemption operate to implicitly preempt, by force of federal law, any required disclosure by North Carolina's Public Records Act of the requested records. Plaintiffs appealed the portion of the trial court's order and final judgment relating to the denial of access to the student records in dispute to the Court of Appeals.

In addressing the respective arguments of plaintiffs and defendants, the lower appellate court's analysis of the questions presented for resolution included the following subjects: the Public Records Act enacted by the North Carolina General Assembly, the Family Educational Rights and Privacy Act enacted by the United States Congress, the interaction between this state law and this federal law regarding their individual and joint impacts on the present case, and principles of federal preemption. In an effort to promote efficiency and to diminish repetition, we shall integrate the parties' respective arguments, the Court of Appeals' determinations, and the Court's conclusions throughout our opinion's overlapping treatment of them.

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1. Both parties agree that the matter concerning UNC-CH employees' records which is addressed in the trial court's order and final judgment is not at issue on appeal.

Analysis

A. The legislative enactments

Plaintiffs initially asked defendants to provide copies of all public records made or received by UNC-CH in connection with any person having been found responsible for rape, sexual assault, or any related or lesser-included sexual conduct by UNC-CH's Honor Court, the Committee on Student Conduct, or the Equal Opportunity and Compliance Office. This request was made pursuant to the Public Records Act, which is codified in the North Carolina General Statutes in §§ 132-1 through 132-11. The request was subsequently narrowed to encompass records in the custody of UNC-CH that included (a) the name of any person who, since January 1, 2007, had been found responsible for rape, sexual assault, or any related or lesser-included sexual misconduct by the UNC-CH Honor Court, the Committee on Student Conduct, or the Equal Opportunity and Compliance Office; (b) the date and nature of each violation for which each such person was found responsible; and (c) the sanctions imposed on each such person for each such violation.

In its totality, N.C.G.S. § 132-1 reads as follows:

> (a) "Public record" or "public records" shall mean all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions. Agency of North Carolina government or its subdivisions shall mean and include every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority or other unit of government of the State or of any county, unit, special district or other political subdivision of government.
>
> (b) The public records and public information compiled by the agencies of North Carolina government or its subdivisions are the property of the people. Therefore, it is the policy of this State that the people may obtain copies of their public records and public information free or at minimal cost unless otherwise specifically provided by law. As

> used herein, "minimal cost" shall mean the actual cost of reproducing the public record or public information.

N.C.G.S. § 132-9(a) states, in its entirety:

> Any person who is denied access to public records for purposes of inspection and examination, or who is denied copies of public records, may apply to the appropriate division of the General Court of Justice for an order compelling disclosure or copying, and the court shall have jurisdiction to issue such orders if the person has complied with G.S. 7A-38.3E.[2] Actions brought pursuant to this section shall be set down for immediate hearing, and subsequent proceedings in such actions shall be accorded priority by the trial and appellate courts.

In declining plaintiffs' request for the identified records in its custody, UNC-CH interpreted the Family Educational Rights and Privacy Act—codified at 20 United States Code Section 1232g—to permit UNC-CH the ability to deny access to the records at issue, based upon its obligation to comply with Title IX of the Education Amendments of 1972, found in 20 U.S.C. §§ 1681–88. Pertinent provisions of FERPA regarding the parties' respective positions, the trial court's order and final judgment, the Court of Appeals decision, and this Court's determination include salient segments of:

- 20 U.S.C. § 1232g(a)(4)(A): "For the purposes of this section, the term 'education records' means . . . those records, files, documents, and other materials which[ ] (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution";
- 20 U.S.C. § 1232g(b)(1): "No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information . . .) of students without the written consent of their parents . . .";

2. N.C.G.S. § 7A-38.3E governs the mediation of public records disputes.

- 20 U.S.C. § 1232g(b)(2): "No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information . . . except . . . such information is furnished in compliance with judicial order . . . upon condition that parents and the students are notified of all such orders . . . in advance of the compliance therewith by the educational institution or agency . . .";
- 20 U.S.C. § 1232g(b)(6)(B): "Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student who is an alleged perpetrator of any crime of violence . . . or a nonforcible sex offense, if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense";
- 20 U.S.C. § 1232g(b)(6)(C): "For the purpose of this paragraph, the final results of any disciplinary proceeding[ ] (i) shall include only the name of the student, the violation committed, and any sanction imposed by the institution on that student; and (ii) may include the name of any other student, such as a victim or witness, only with the written consent of that other student"; and
- 20 U.S.C § 1681(a): "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."

B. Consideration and application of the Public Records Act and the Family Educational Rights and Privacy Act

This Court reviews issues of statutory interpretation *de novo*. "The principal goal of statutory construction is to accomplish the legislative intent." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citing *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998). "The cardinal principle of statutory construction is that

the intent of the legislature is controlling. In ascertaining the legislative intent courts should consider the language of the statute, the spirit of the statute, and what it seeks to accomplish." *State ex rel. Util. Comm'n v. Public Staff*, 309 N.C. 195, 210, 306 S.E.2d 435, 443-44 (1983) (citations omitted). "When construing legislative provisions, this Court looks first to the plain meaning of the words of the statute itself[.]" *State v. Ward*, 364 N.C. 157, 160, 694 S.E.2d 729, 731 (2010). "When multiple statutes address a single matter or subject, they must be construed together, *in pari materia*, to determine the legislature's intent." *Carter-Hubbard Publ'g Co., Inc. v. WRMC Hosp. Operating Corp.*, 178 N.C. App. 621, 624, 633 S.E.2d 682, 684 (2006), *aff'd*, 361 N.C. 233, 641 S.E.2d 301 (2007). "Statutes *in pari materia* must be harmonized, 'to give effect, if possible, to all provisions without destroying the meaning of the statutes involved.' " *Id.* (citation omitted). As we said in *Empire Power Co. v. N.C. Dept. of E.H.N.R.*, 337 N.C. 569, 447 S.E.2d 768 (1994), a case upon which both parties rely to support their respective views here regarding statutory construction and its *in pari materia* component:

> as in any area of law, the primary function of a court is to ensure that the purpose of the Legislature in enacting the law, sometimes referred to as legislative intent, is accomplished . . . We should be guided by the rules of construction that statutes *in pari materia*, and all parts thereof, should be construed together and compared with each other. Such statutes should be reconciled with each other when possible.

Id. at 591, 447 S.E.2d at 781.

In the present case, the state's legislative body—the North Carolina General Assembly—has clearly expressed its intent through the Public Records Act to make public records readily accessible as "the property of the people," as described in N.C.G.S. § 132-1(b). There is no dispute between plaintiffs and defendants before this Court that the student disciplinary records meet the definition of "public records" under N.C.G.S. § 132-1, that UNC-CH comes within the purview of the Public Records Act, and that said records are within the custody and control of UNC-CH. The Public Records Act "affords the public a broad right of access to records in the possession of public agencies and their officials." *Times-News Publ'g Co. v. State of N.C.*, 124 N.C. App. 175, 177, 476 S.E.2d 450, 451-52 (1996) *disc. review denied*, 345 N.C. 645, 483 S.E.2d 717 (1997). The Act is intended to be liberally construed to ensure that governmental records be open and made available to the public, subject only to a few limited exceptions. The Public Records Act thus allows access to

all public records in an agency's possession "*unless* either the agency or the record is specifically exempted from the statute's mandate." *Times-News*, 124 N.C. App. at 177, 476 S.E.2d at 452 (emphasis added). "Exceptions and exemptions to the Public Records Act must be construed narrowly." *Carter-Hubbard Publ'g Co.*, 178 N.C. App. at 624, 633 S.E.2d at 684.

As for the Family Educational Rights and Privacy Act, the federal legislative body—the United States Congress—has clearly expressed its intent through FERPA that the ready accessibility of education records exhibited by an "educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information . . .) of students without the written consent of their parents . . ." shall result in "[n]o funds . . . be[ing] made available under any applicable program" to such an educational agency or institution, pursuant to 20 U.S.C. § 1232g(b)(1). Just as the student disciplinary records at issue in the instant case are considered to be "public records" under the state's Public Records Act, they are also considered to be "education records" under FERPA; just as UNC-CH is deemed to be an "agency of North Carolina government or its subdivisions" under the Public Records Act, it is also deemed to be an "educational agency or institution" under FERPA.

Defendants have chosen to construe FERPA in such a manner that they have considered UNC-CH to be prohibited "from disclosing 'education records,' including records related to sexual assault investigations and adjudications governed by Title IX." Regarding "campus disciplinary adjudications of sexual assault," UNC-CH opines that "FERPA prohibits the disclosure of education records but grants universities discretion to determine whether to disclose three items of information: the name of the responsible student, the violation, and the sanction imposed." In light of its construction of FERPA and this federal law's perceived concomitant relationship with Title IX as embodied in 20 U.S.C. § 1681(a), *et seq.*, UNC-CH assumes the posture as to the release of the student disciplinary records which are the focus of this legal controversy, that "the University has exercised its discretion and has declined to disclose this information because the University has determined that the release of this information would lead to the identification of victims, jeopardize the safety of the University's students, violate student privacy, and undermine the University's efforts to comply with Title IX."

Defendants' justification for its interpretation of FERPA in this subject matter area is premised on its application of FERPA's provision of

20 U.S.C. § 1232g(b)(6)(B), from which it is surmised that UNC-CH has the discretion to determine whether to release information about a student disciplinary proceeding outcome, and FERPA's provision of 20 U.S.C. § 1232g(b)(6)(C)(i), which limits the divulgence of "the final results of any disciplinary proceeding" to "the name of the student, the violation committed, and any sanction imposed by the institution or that student . . . ." Defendants discern that the phrase contained in 20 U.S.C. § 1232g(b)(6)(B), "*if* the institution *determines* as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense" (emphasis added) impliedly cloaks UNC-CH with the discretionary authority to determine whether to release the outcome of a student disciplinary proceeding in light of the introductory portion of the provision that "[n]othing in this section shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student who is an alleged perpetrator of any crime of violence . . . or a nonforcible sex offense . . . ." It is compelling in light of the Court's duty to observe and to implement the aforementioned canons of statutory construction, that there is no express provision in FERPA that reposes the authority in UNC-CH to exercise the discretion that it purports to have. On the other hand, plaintiffs assert that there is no conflict between the state's Public Records Act and the federal law, FERPA, that the Public Records Act and its underlying legislative intent support liberal access to the records at issue here, and that the Court of Appeals is correct in its determination that the two legislative enactments which govern these records can and should be construed *in pari materia* so as to afford plaintiffs the access to the student disciplinary records which is sought.

We conclude that the Court of Appeals correctly held that 20 U.S.C. § 1232g(b)(6)(B) did not grant implied discretion to UNC-CH to determine whether to release the results of a student disciplinary proceeding emanating from rape, sexual assault, or sexual misconduct charges in absence of language expressly granting such discretion. We also note that the lower appellate court properly recognized that "[p]laintiffs' records request is limited to students who UNC-CH has already expressly determined to have engaged in such misconduct, and the records of which are expressly subject to disclosure under FERPA." *DTH v. Folt*, 259 N.C. App. at 69, 816 S.E.2d at 524 (citing 20 U.S.C. § 1232g(b)(6)(B)). Since FERPA contains no such language, but instead specifies that the categories of records sought here are public records subject to disclosure—"Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing . . ."

—we see no conflict between the federal statute and the state Public Records Act. This North Carolina law has been interpreted consistently by our state courts as intended for liberal construction affording ready access to public records, subject to limited exceptions. *See Carter-Hubbard Publ'g Co.*, 178 N.C. App. at 624, 633 S.E.2d at 684. Accordingly, we conclude, as did the Court of Appeals, that defendants' contended interpretation of the two statutes "conflicts with both the Public Records Act's mandatory disclosure requirements and the plain meaning of FERPA's § 1232g(b)(6)(B), which allows disclosure." *Id.* at 70–71, 816 S.E.2d at 525. This result reconciles and harmonizes the Public Records Act and the Family Educational Rights and Privacy Act, while preserving the integrity of the well-established doctrines which guide proper statutory construction. It also reinforces that the Public Records Act may be available to compel disclosure through judicial process if necessary, in the face of a denial of access to such records.

Unfortunately, the dissent subscribes to UNC-CH's depiction of the University's discretion "to produce the records at issue upon request by a third party if it chooses to do so *in the exercise of its independent judgment*." In embracing the position of UNC-CH that the institution possesses such pervasive discretion in light of the federal law, the dissent strives to justify its acceptance of this representation by combining the open-ended, non-prohibitive beginning phrase of 20 U.S.C. § 1232g(b)(6)(B), "*Nothing in this section shall be construed* to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student . . ." (emphasis added) with the permissive introductory language of 34 C.F.R. § 99.31(a), "An educational agency or institution *may* disclose personally identifiable information from an education record of a student . . ." (emphasis added) so as to allow this tandem of federal law provisions to operate as though the state's Public Records Act does not exist. Indeed, it is a fairly elementary deduction, in neatly configuring these two separate segments of federal enactments into the single determinant which the dissent declares, that "Nothing in this section [20 U.S.C. § 1232g(b)(6)(B)] shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student . . . [such that] [a]n educational agency or institution may disclose personally identifiable information from an education record of a student . . . ." We agree that, standing alone, a postsecondary educational institution possesses such discretion to disclose. However, when such a postsecondary educational institution is a *public* postsecondary educational institution such as UNC-CH, operating as an undisputed "agency

of North Carolina" under the Public Records Act and therefore subject to comply with requests for public records when asserted under N.C.G.S. § 132-1, then "[n]othing in this section [20 U.S.C. § 1232g(b)(6)(B)] shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student."

Therefore, in properly applying the foundational principles of statutory construction so as to reconcile multiple legislative enactments in an effort to harmonize their joint and mutual operation, the established methodology to be applied here would be an examination, in the first instance, of the state law's mandatory Public Records Act provision and the federal law's permissive Code of Federal Regulations language which supplements FERPA's open-ended and non-prohibitive language, instead of the dissent's employment of the erroneous methodology of initially combining the two federal provisions, thus developing in a vacuum the flawed conclusion consistent with UNC-CH's view that the University commands discretion over the release of the public records, and only then secondarily considering the operation of the Public Records Act after having prematurely succumbed to the conclusions that "a university has the authority to produce the records at issue upon request by a third party if it chooses to do so in *the exercise of its independent judgment*" and "the doctrine of conflict preemption is directly applicable" which would preclude the operation of the Public Records Act in the present case. Plaintiffs submitted their request for the records at issue to the University pursuant to the Public Records Act because of the educational institution's status as an "agency of North Carolina." It is therefore appropriate, due to the mandatory nature of the state law and the liberal construction which our state courts have given it, to look initially at the application of the Public Records Act in light of plaintiffs' request, then assess whether there are any other legislative provisions of any sort which present potential conflict with the operation of the Public Records Act, and then implement the established principles of statutory construction to reconcile such provisions. *See Times-News*, 124 N.C. App. at 177, 476 S.E.2d at 452 (The Public Records Act allows access to all public records in an agency's possession "*unless either the agency or the record is specifically exempted from the statute's mandate*." (emphasis added)). In the present case, however, the dissent elects to ignore the logical inception of the analysis by vaulting the state's Public Records Act, grasping the federal nature of FERPA and the cited provision from the Code of Federal Regulations, and concluding that an opening assessment of the applicability of the state law upon which plaintiffs' records request is expressly premised leads to a "look to North Carolina

law to determine congressional intent." The dissent's depiction and conclusion are both inaccurate. This defective approach by the dissent miscalculates the authority of 20 U.S.C. § 1232g(b)(6)(B) and 34 C.F.R. § 99.31 in the face of N.C.G.S. §132-1, by erroneously elevating the authority of the federal law's application here while wrongfully subjugating the authority of the state law's express mandates which require that the public records at issue be released in the dearth of any federal law express mandates which require that these public records be withheld.

Consistent with the rule of statutory construction to regard the plain meaning of the words of a statute, 20 U.S.C. § 1232g(b)(6)(C) allows only the disclosure of the name of the student, the violation committed, and any sanction imposed by the institution on that student upon the release of the final results of any disciplinary proceeding. We agree with the Court of Appeals that the dates of offenses which were requested by plaintiffs pursuant to the Public Records Act are not subject to disclosure under FERPA; therefore, UNC-CH is only required to disclose to plaintiffs, pursuant to the operation of the Public Records Act, the name of the student, the violation committed, and any sanction imposed by UNC-CH on that student upon the release of the final results of any disciplinary proceeding.

C. Examination of the federal preemption doctrine

Defendants invoke the doctrine of federal preemption in contending that "[e]ven if the [state's] Public Records Act mandated disclosure, FERPA would preempt the Act through conflict preemption[,]" and "FERPA also preempts the Public Records Act because mandating disclosure frustrates the purposes of federal law, which allocates to the University the ability to decide whether disclosure best promotes the prevention of sexual assaults and misconduct on a campus." Additionally, defendants posit that "FERPA's discretion also conflicts with the Public Records Act's purported disclosure mandate." These federal preemption theories, which are posited by defendants, are all based on the faulty premise that UNC-CH has the discretion to determine whether to release the final results of any student disciplinary proceeding—a postulation which we have already nullified in our earlier analysis. While defendants claim that "[c]onflict preemption applies because compliance with both FERPA and the Public Records Act is impossible here," we have already determined in this case that such compliance is possible. Although defendants argue that "FERPA and the Public Records Act conflict because the University cannot both exercise discretion about releasing information and be forced to release records containing that information," we have heretofore established in this case that the two

Acts do not conflict under these circumstances as well as held in this case that UNC-CH does not have the discretion regarding the release of the information at issue. Nonetheless, since our learned colleagues who are in the dissent have addressed their view of the role of the doctrine of federal preemption in this case and since the lower appellate court addressed the subject of the applicability of the federal preemption doctrine in notable detail in its opinion, we elect to examine the principle to a warranted degree.

Generally, if a state law conflicts with a federal law that regulates the same conduct, the federal law prevails under the doctrine of preemption. "A reviewing court confronting this question begins its analysis with a presumption against federal preemption." *State ex rel Utilities Comm'n v. Carolina Power & Light Co.*, 359 N.C. 516, 525, 614 S.E.2d 281, 287 (2005); *see also Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715 (1985). The presumption is grounded in the fact that a finding of federal preemption intrudes upon and diminishes the sovereignty accorded to states under our federal system. Indeed, in *Wyeth v. Levine*, the United States Supreme Court explained that "[i]n all [preemption] cases, and particularly those in which Congress has 'legislated . . . in a field which the States have traditionally occupied' . . . we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " 555 U.S. 555, 565 (2009) (alterations in original) (quoting *Medtronic, Inc. v. Lovr*, 518 U.S. 470, 485 (1996)). The exercise of such authority by the United States Congress, where shown clearly and manifestly by the federal legislative body, is known as "express preemption"; however, Congress may also achieve such a result through "implicit preemption." Congress may consequently preempt, i.e. invalidate, a state law through federal legislation. It may do so through express language in a statute. But even where a statute does not refer expressly to preemption, Congress may implicitly preempt a state law, rule, or other state action. *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 376 (2015). Congress may implement implicit preemption either through conflict or field preemption. *Id.* "Conflict preemption exists where 'compliance with both state and federal law is impossible' or where 'the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Id.* at 377 (citing *California v. AR Calmenica Corp.*, 490 U.S. 93, 100–01 (1989)). As to field preemption, "Congress has forbidden the State to take action in the *field* that the federal statute preempts." *Id.*

The Court of Appeals, in the present case, considered both types of the conflict preemption aspect of the federal preemption doctrine and

determined that there was no conflict between the federal law, FERPA, and the state's Public Records Act, because compliance by UNC-CH with both of them is possible. As the lower tribunal noted in considering the first type, "[d]efendants would not violate § 1232g(b)(6)(B) by disclosing and releasing the records Plaintiffs requested in order to comply with the Public Records Act." *DTH v. Folt*, 259 N.C. App. at 74, 816 S.E.2d at 527. With regard to the second type, the Court of Appeals reasoned that "the Public Records Act disclosure requirements do not 'stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' " in that "[t]he plain text of § 1232g(b)(6)(B) permits Defendants' disclosure of the limited information specifically listed therein." *Id.* (quoting *Oneok*, 575 U.S. at 377). Although in our view the Court of Appeals analyzed conflict preemption unnecessarily as explained above, it nonetheless applied the doctrine correctly in general, and *Oneok* in particular.

The dissent unequivocally views FERPA as preventing the operation of the Public Records Act in the present case, opining that "[a] federal law that grants discretion is fundamentally irreconcilable with a state law that seeks to override that discretion." In this analytical exercise, the dissent again begins with the fundamental misstep that the FERPA provision of 20 U.S.C. § 1232g(b)(6)(B) is buttressed by 34 C.F.R. § 99.31 so as to establish a federally entrenched discretion for a *public* postsecondary educational institution like UNC-CH which is mandatorily subject to the Public Records Act as a state agency before the dissent is inclined to include the state law in its contemplation. This misstep, in turn, leads to the dissent's logical—though erroneous due to the faulty original premise—sequential misstep that "the federal law and state law fundamentally conflict." Consequently, instead of utilizing the aforementioned established tenets of statutory construction "that statutes *in pari materia*, and all parts thereof, should be construed together and compared with each other [because] [s]uch statutes should be reconciled with each other when possible," *Empire Power*, 337 N.C. at 591, 447 S.E.2d at 781, the dissent chooses to construe the cited principles in *Oneok* to support the applicability of the doctrine of conflict preemption in the instant case. Ultimately, as a result of the misapprehended precursors, the dissent arrives at its conclusion that conflict preemption exists here, as the principle is explained in *Oneok*.

Oneok presented an opportunity for the Supreme Court of the United States to address the issue of whether the federal Natural Gas Act preempted state antitrust lawsuits against interstate pipelines which would be based upon non-federally regulated retail natural gas prices.

Oneok, 575 U.S. at 376. In holding that the state's antitrust claims were not preempted by the federal Natural Gas Act, the high court explained that an examination of the applicability of preemption must "emphasize the importance of considering the *target* at which the state law aims in determining whether that law is preempted." *Id.* at 377. Just as the United States Supreme Court determined in *Oneok* that it would not find the operation of the principle of conflict preemption as appropriate in construing the federal law and the state law, we agree with the overarching principle enunciated in *Oneok* and therefore apply it here. While conflict preemption exists where compliance with both state and federal law is impossible or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, conflict preemption does not exist in the present case because compliance with both the Public Records Act and FERPA is possible, and the Public Records Act does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress regarding the governance of education under Title 20 of the Unites States Code.

Lastly, defendants' reliance on *United States v. Miami University*, 294 F.3d 797 (6th Cir. 2002) to establish the existence of the field preemption aspect of the federal preemption doctrine to this Court's satisfaction is unpersuasive. While we reiterate that the analysis which this Court elects to engage is arguably superfluous due to defendants' illustrated misassumptions, we choose to evaluate this remaining feature of the federal preemption doctrine in order to address defendants' contention that in *Miami University*, "[t]he court rejected claims that the Ohio public records law was broad and required disclosure." However, while the Sixth Circuit Court of Appeals acknowledged that FERPA generally shields student disciplinary records from release, the exception to the Act's disclosure prohibitions in *Miami University* which has direct application to the instant case was viewed by the federal appellate court in the following manner:

> Congress balanced the privacy interests of an alleged perpetrator of any crime of violence or nonforcible sex offense with the rights of the alleged victim of such a crime and concluded that the right of an alleged victim to know the outcome of a student disciplinary proceeding, regardless of the result, outweighed the alleged perpetrator's privacy interest in that proceeding. *Congress also determined that, if the institution determines that an alleged perpetrator violated the*

> *institution's rules with respect to any crime of violence or nonforcible sex offense, then the alleged perpetrator's privacy interests are trumped by the public's right to know about such violations.*

294 F.3d 797, 812-813 (2002) (emphasis added).

The federal appellate court's ruling in *Miami University* clearly demonstrates that the principle of field preemption does not apply to this case and that defendants' dependence on its operation here is misplaced. Although FERPA is a legislative enactment of Congress, nevertheless the public records law of Ohio was deemed to be the prevailing authority where the access to information about the result of a student disciplinary proceeding regarding any allegation of a crime of violence or nonforcible sex offense outweighed the alleged student perpetrator's privacy interests which are generally protected by FERPA. In light of the strong parallels between the state public records laws of Ohio and North Carolina, the subject matter of the disclosure of the outcomes of the types of student disciplinary proceedings of educational institutions located in each of the two states, and each university's respective reliance on the applicability of the field preemption doctrine based on a contention that FERPA preempts the operation of such a state public records law, we embrace the logic of the Sixth Circuit Court of Appeals. In enacting FERPA, Congress has not forbidden North Carolina's legislative body from taking action in the field of education where the disclosure of the result of a student disciplinary proceeding conducted at a public postsecondary educational institution which operates as an agency of North Carolina is mandated by the state's Public Records Act. Consequently, defendants' reliance on the principle of field preemption fails.

In the instant case, the federal preemption doctrine does not apply; therefore, the Family Educational Rights and Privacy Act does not preempt the Public Records Act so as to prohibit UNC-CH from disclosing the final results of any disciplinary proceeding as requested by plaintiffs.

Conclusion

We hold that officials of The University of North Carolina at Chapel Hill are required to release as public records certain disciplinary records of its students who have been found to have violated UNC-CH's sexual assault policy. The University does not have discretion to withhold the information sought here, which is authorized by, and specified in, the federal Family Educational Rights and Privacy Act as subject to release. Accordingly, as an agency of the state, UNC-CH must comply with the

North Carolina Public Records Act and allow plaintiffs to have access to the name of the student, the violation committed, and any sanction imposed by the University on that student in response to plaintiffs' records request.

AFFIRMED.

Justice DAVIS, dissenting.

I respectfully dissent. The majority's analysis fundamentally misapplies the federal preemption doctrine. As discussed more fully below, the dispositive issue in this case is whether FERPA confers discretion upon universities regarding whether to release the category of records at issue. If FERPA does so, then the doctrine of preemption precludes states from mandating that universities exercise that discretion in a certain way.

The threshold question of whether such discretion exists must be resolved solely by examining the relevant *federal* law, which in this case consists of FERPA and its accompanying federal regulations. The majority goes astray in this inquiry by instead looking to *state* law to determine whether discretion has been conferred. In doing so, the majority turns the preemption analysis on its head. It simply makes no sense to examine a provision of state law to determine whether *Congress* has conferred discretion upon universities.

The essence of the preemption doctrine is that state law cannot conflict with federal law. In this case, the specific question is whether the application of the North Carolina Public Records Act—which, in the absence of FERPA, would require defendants to produce these records—would be inconsistent with how Congress has authorized universities to treat such records. Therefore, because this inquiry solely concerns the intent of Congress, it is illogical to look to North Carolina law to determine congressional intent. It is only once a determination has been made as to whether *federal* law confers such discretion that it then becomes appropriate to examine state law to ascertain whether a conflict exists between state and federal law on the issue. But state law has no bearing on the issue of whether such discretion exists in the first place. It is this basic error that infects the majority's entire analysis and causes it to reach a result that is legally incorrect.

The specific provision of FERPA relevant to this case is 20 U.S.C. § 1232g(b)(6)(B) (2018), which provides, in pertinent part, as follows:

> *Nothing in this section shall be construed to prohibit* an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student who is an alleged perpetrator of any crime of violence . . . or a nonforcible sex offense, if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense.

Id. (emphasis added). This statutory provision is supplemented by the following pertinent provisions contained in regulations promulgated by the United States Department of Education and codified in the Code of Federal Regulations:

> (a) An educational agency or institution *may* disclose personally identifiable information from an education record of a student . . . if the disclosure meets one or more of the following conditions:
>
> . . . .
>
> (14)
>
> (i) The disclosure . . . is in connection with a disciplinary proceeding at an institution of postsecondary education. The institution must not disclose the final results of the disciplinary proceeding unless it determines that—
>
> (A) The student is an alleged perpetrator of a crime of violence or non-forcible sex offense; and
>
> (B) With respect to the allegation made against him or her, the student has committed a violation of the institution's rules or policies.

34 C.F.R. § 99.31(a)(14)(i) (2019) (emphasis added).

The regulations then proceed to clarify that "paragraph[ ] (a) . . . of this section *do[es] not require* an educational agency or institution . . . to disclose education records or information from education records to any party, *except for parties under paragraph (a)(12) of this section*." 34 C.F.R. § 99.31(d) (emphasis added). Paragraph (a)(12), in turn, applies only to the disclosure of information "to the parent of a student . . . or to the student." 34 C.F.R. § 99.31(a)(12).

Thus, FERPA's grant of discretion to universities regarding the release of these records to third parties such as plaintiffs is evidenced by the pertinent language of the statute itself read in conjunction with the language of the accompanying federal regulations. As quoted above, the applicable provision of FERPA states that "[n]othing in this section shall be construed to prohibit" disclosure—language that neither prohibits nor requires the release by universities of the category of records sought by plaintiffs. 20 U.S.C. § 1232g(b)(6)(B). This permissive language is then reinforced by the language of the accompanying federal regulations, which remove any doubt on this issue. These regulations plainly and unambiguously state that a university "may"—but is "not require[d]" to— disclose such records to parties other than the students themselves and their parents. 34 C.F.R. § 99.31(a), (d). Thus, the combined effect of 20 U.S.C. § 1232g(b)(6)(B) and 34 C.F.R. § 99.31 serves to make clear that a university has the authority to produce the records at issue upon request by a third party if it chooses to do so in the exercise of its independent judgment.

The Supreme Court of the United States—like this Court—has made clear that when a statute says an actor "may" take certain action, such language constitutes a grant of discretion to that actor. *See, e.g.*, *Halo Elecs.*, *Inc. v. Pulse Elecs.*, *Inc.*, 136 S. Ct. 1923, 1931 (2016) ("[W]e have emphasized that the word 'may' clearly connotes discretion."); *Jama v. Immigration and Customs Enf't*, 543 U.S. 335, 346 (2005) ("The word 'may' customarily connotes discretion."); *Fogerty v. Fantasy*, *Inc.*, 510 U.S. 517, 533 (1994) ("The word 'may' clearly connotes discretion."); *United States v. Rodgers*, 461 U.S. 677, 706 (1983) ("The word 'may,' when used in a statute, usually implies some degree of discretion."); *see also Silver v. Halifax Cty. Bd. of Comm'rs*, 371 N.C. 855, 863–864, 821 S.E.2d 755, 760–762 (2018) (explaining that the word " 'may' is generally intended to convey that the power granted can be exercised in the actor's discretion").

Indeed, both in its appellate brief to this Court and at oral argument, plaintiffs' counsel *expressly conceded* that FERPA grants discretion to defendants regarding the release of the records sought in this lawsuit. *See* Pl.'s Br. at 12–13 ("In their brief defendants argue that . . . FERPA confers them with 'discretion' whether to release or withhold the records at issue. *Indeed, it does* . . .") (emphasis added).

This concession by plaintiffs' counsel is not surprising. Given the absence of any dispute that the category of documents sought by plaintiffs in this case is, in fact, governed by 20 U.S.C. § 1232g(b)(6)(B), there are only three possible conclusions. FERPA either (1) *prohibits*

universities from producing the records at issue; (2) *requires* that they produce the records; or (3) allows universities to exercise their own independent judgment over whether to produce them. Given that the majority does not take the position that Congress has either expressly required or expressly prohibited such disclosure, the only remaining option is the third one—that is, the conclusion that FERPA confers discretion on universities as to whether such records should be produced to a third party in a particular case. Indeed, at one point in its analysis, the majority appears to recognize that discretion exists under federal law, stating that "standing alone, a postsecondary educational institution possesses such discretion to disclose" these records.[1]

Because it is clear that such discretion exists under FERPA, the only remaining question is whether a state law such as North Carolina's Public Records Act can lawfully require that a university exercise its discretion in favor of disclosure. Under the doctrine of federal preemption, the answer is no. A university must be allowed to exercise its federally mandated discretion unimpeded by a state law that seeks to eliminate that discretion.

The Supremacy Clause of the United States Constitution provides that "the Laws of the United States . . . shall be the supreme Law of the Land . . . [the] Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2. As a result, "when federal and state law conflict, federal law prevails and state law is preempted." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476 (2018). The Supreme Court of the United States has made clear that preemption can occur not only through a federal statute but also based on federal regulations. *See Fidelity Fed. Sav. and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) ("Federal regulations have no less pre-emptive effect than federal statutes."); *see also City of New York v. F.C.C.*, 486 U.S. 57, 64 (1988) ("The statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof.").

The Supreme Court has recognized three different forms of this doctrine: (1) express preemption, (2) field preemption, and (3) conflict

1. The majority also acknowledges that it is only because UNC-CH is a public institution that North Carolina's Public Records Act applies and therefore private educational institutions in this state unquestionably continue to possess the discretion granted by FERPA to decide whether to release the requested information. If there was no conflict between FERPA and the Public Records Act, then private and public institutions would be in the same situation. However, it is precisely because of that conflict that the majority's opinion results in different rules for post-secondary educational institutions in the state, depending on whether they are public or private.

preemption. *Murphy*, 138 S. Ct. at 1480. Express preemption occurs when a federal statute uses explicit language indicating its intent to override state law. *See English v. Gen. Elec. Co.*, 496 U.S. 72, 78–79 (1990). Field preemption occurs when Congress passes comprehensive legislation intending "to occupy an entire field of regulation," acting as the exclusive authority in that area and "leaving no room for the States to supplement federal law." *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 509 (1989).

The final type of preemption is conflict preemption (also known as implied preemption), which occurs when federal law and state law fundamentally conflict. Conflict preemption exists when (1) "compliance with both state and federal law is impossible" or (2) when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Oneok Inc. v. Learjet, Inc.*, 575 U.S. 373, 377 (2015).

The present case involves conflict preemption. A university cannot simultaneously (1) exercise its discretion conferred by FERPA regarding whether these records should be produced to third parties upon request; *and* (2) be automatically required by state law to produce those same records on demand. A federal law that grants discretion to universities is fundamentally irreconcilable with a state law that seeks to override that discretion. FERPA gives defendants a choice, while the Public Records Act gives them a command. As a result, the doctrine of conflict preemption is directly applicable.

In asserting that the doctrine of conflict preemption does not apply in this case, the majority misapprehends the basic inquiry in which a court must engage when faced with a federal preemption issue. If—as here—a conflict exists between state and federal law, the federal law must prevail. Thus, the majority's assertion that application of the preemption doctrine would require "erroneously elevating" the federal law while "wrongfully subjugating" the state law is, in reality, nothing less than a rejection of the preemption doctrine itself.

While its opinion is not entirely clear, the majority then appears to state its belief that—even assuming discretion does exist under FERPA—the preemption doctrine is not triggered simply because releasing the records as mandated by North Carolina's Public Records Act is one of the options available to defendants in the exercise of their discretion. But this reasoning is antithetical to the very concept of discretion. Black's Law Dictionary defines discretion as "[w]ise conduct and management *exercised without constraint*; the ability coupled with

the tendency to act with prudence and propriety . . . [f]reedom in the exercise of judgment; *the power of free decision-making*." *Black's Law Dictionary* (11th ed. 2019) (emphasis added). It is self-evident that a law that commands a single outcome necessarily conflicts with a separate law that grants the power of unconstrained decision-making.

Moreover, the Supreme Court of the United States has expressly rejected the very mode of reasoning engaged in by the majority. In *Barnett Bank of Marion Cty., N.A. v. Nelson*, 517 U.S. 25 (1996), a federal statute granted national banks the authority to sell insurance, but Florida law prohibited such banks from doing so. *Id.* at 27–28. The Supreme Court first noted that "the two statutes do not impose directly conflicting duties on national banks—as they would, for example, if the federal law said 'you must sell insurance,' while the state law said, 'you may not.' " *Id.* at 31. Nevertheless, the Supreme Court determined that the federal statute preempted the Florida law. *Id.* The Supreme Court characterized the conflict as involving a federal statute that "authorizes national banks to engage in activities that the State Statute expressly forbids." *Id.* The Supreme Court concluded that when Congress grants an entity "an authorization, permission, or power," states may not "forbid, or [ ] impair significantly, exercise of a power that Congress explicitly granted." *Id.* at 33.

Similarly, in *Fidelity Fed. Sav. and Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982), a federal regulation permitted savings and loan associations to utilize due-on-sale clauses in contracts, but California law limited the use of these clauses. *Id.* at 144–145. The Supreme Court held that the state law was preempted, explaining that the "conflict [between the laws] does not evaporate because the [ ] regulation simply permits, but does not compel" banks to include such clauses. *Id.* at 155. Just as in *Barnett*, the Supreme Court found it immaterial that compliance with both laws "may not be a physical impossibility," reasoning that the state law impermissibly deprived the banks of the "flexibility given it by the [federal regulation]." *Id. See also Lawrence Cty. v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 260–61 (1985) (holding that a federal law providing that counties "may use [certain specified federal] payments for any governmental purpose" preempted a state law requiring counties to allocate those payments to school districts; rejecting as "seriously flawed" the state's argument that no preemption existed simply because the funding of school districts constituted a governmental purpose).

The same principles apply here. FERPA and its accompanying regulations gave defendants the discretion to decide whether release of the

records sought by plaintiffs was appropriate. The Public Records Act, conversely, would—if given effect—make the release of such records mandatory, thereby completely eliminating the discretion conferred by Congress. Therefore, the Public Records Act cannot be given effect under these circumstances. In short, a federal law's "may" cannot be constrained by a state law's "must."

For these reasons, I would reverse the decision of the Court of Appeals. Accordingly, I respectfully dissent.[2]

Justices ERVIN and EARLS join in this dissenting opinion.

2. It is important to emphasize that this Court lacks the authority to determine whether the release of the records sought by plaintiffs is wise or unwise as a matter of public policy. Congress has expressly made that determination by conferring discretion upon universities regarding the disclosure of such information.

IN RE A.G.D.

[374 N.C. 317 (2020)]

IN THE MATTER OF A.G.D. AND A.N.D.

No. 258A19

Filed 1 May 2020

Termination of Parental Rights—grounds for termination—willful abandonment—incarceration—order prohibiting direct contact with children

The trial court's findings supported its conclusion that a father's parental rights in his children were subject to termination on the ground of abandonment (N.C.G.S. § 7B-1111(a)(7)). Even though the father was incarcerated and was prohibited by a custody and visitation order from directly contacting his children, he made no attempts during the determinative six-month period to contact the mother or anyone else to inquire about the children's welfare or to send along his best wishes to them. Further, the father would not even clearly tell his trial counsel whether he wanted to contest the termination of parental rights action.

Justice EARLS dissenting.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 6 March 2019 by Judge Robert J. Crumpton in District Court, Ashe County. This matter was calendared for argument in the Supreme Court on 25 March 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

No brief filed for petitioner-appellee mother.

Edward Eldred for respondent-appellant father.

ERVIN, Justice.

Respondent-father Aaron D. appeals from orders[1] entered by the trial court terminating his parental rights in his minor children A.G.D.

1. The trial court entered separate, although essentially identical, orders terminating respondent-father's parental rights in each of his two children. For ease of comprehension, we will treat these separate orders as a single document throughout the remainder of this opinion.

and A.N.D. on the grounds of willful abandonment.[2] After careful consideration of respondent-father's challenge to the trial court's termination orders in light of the record and the applicable law, we conclude that the trial court's termination orders should be affirmed.

Petitioner Amber D. and respondent-father were married in April 2008, with Amy having been born to the parents in 2008 and with Andy having been born to the parents in 2011. The parties separated in March 2013 after Amy revealed that respondent-father had committed repeated sexual assaults against her. Along with a number of other individuals, respondent-father was subsequently charged with having committed multiple criminal acts of sexual abuse in the state and federal courts, including crimes involving child pornography. On 27 May 2014, an order was entered granting the mother sole legal and physical custody of the children, with respondent-father being ordered to have no contact with them in the absence of a further order of the court.[3] A judgment granting an absolute divorce between the parents was entered in July 2014.

On 26 June 2018, the mother filed petitions seeking to have respondent-father's parental rights in the children terminated on the grounds that he had willfully failed to pay any portion of the cost of the children's care and that he had willfully abandoned the children. *See* N.C.G.S. § 7B-1111(a)(4), (7) (2019). After a hearing held on 25 February 2019, the trial court entered orders terminating respondent-father's parental rights in both children on 6 March 2019,[4] with this decision resting upon determinations that respondent-father had willfully abandoned Amy and Andy and that the termination of respondent-father's parental rights in the children would be in their best interests. Respondent-father noted appeals to this Court from the trial court's termination orders.

In seeking to persuade us to grant relief from the trial court's termination orders, respondent-father argues that the trial court erred by

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2. We will refer to A.G.D. and A.N.D. throughout the remainder of this opinion as "Amy" and "Andy," respectively, with these names being pseudonyms that we use for ease of reading and to protect the privacy of the juveniles.

3. The custody and visitation order in question, which the trial court incorporated by reference into the termination order, found as a fact that respondent-father was "currently incarcerated in [the] Ashe County Jail" and was "under a [c]ourt [o]rder not to have any contact with [Amy]" or "with a child under 18" and ordered that respondent-father "shall have no contact with the [children] absent future [o]rders of this Court."

4. The trial court did not find that respondent-father's parental rights in the children were subject to termination on the grounds of a willful failure to pay a reasonable portion of the cost of the children's care.

determining that his parental rights in the children were subject to termination on the grounds of willful abandonment in light of the fact that he had been "prohibited . . . from having any contact with his children." According to respondent-father, "it was not within [his] power to display his love and affection for his children because he was court-ordered not to contact them." In respondent-father's view, the trial court's reliance upon his failure to seek relief from the earlier custody and visitation order was misplaced given that the record contained no evidence tending to show that he had the ability to make such a filing or that there had been "any change of circumstances warranting the filing of" such a motion, citing *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) (stating that a party is only entitled to seek to have a prior custody order modified in the event that "there has been a substantial change in circumstances and that the change affected the welfare of the child"), with it "beg[ging] belief" that respondent-father "could have filed a custody motion every six months for four years." As a result, since respondent-father "was court-ordered not to contact [his children] and could only have shown them filial affection by disobeying a court's order," respondent-father contends that the trial court's termination orders should be reversed.[5]

"We review a trial court's adjudication under N.C.G.S. § 7B-1111 'to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law.' " *In re E.H.P.*, 372 N.C. 388, 392, 831 S.E.2d 49, 52 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984)). A trial court may terminate a parent's parental rights in his or her children based upon a determination that "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion . . . ." N.C.G.S. § 7B-1111(a)(7).[6] In order to find that a parent's parental rights are subject to termination based upon willful abandonment, the trial court must make findings of fact that show that the parent had a "purposeful, deliberative and manifest willful determination to forego all parental duties and relinquish all parental claims to [the child]," *In re N.D.A.*, 373 N.C. 71, 79, 833 S.E.2d 768, 774 (2019) (quoting *In re D.M.O.*, 250 N.C. App. 570, 573, 794 S.E.2d 858, 861–62 (2016)), with a parent having abandoned his or her child

5. The mother did not file a brief in defense of the trial court's orders with this Court.

6. As a result of the fact that the termination petitions were filed on 26 June 2018, the relevant six-month period for purposes of this case runs from 26 December 2017 until 26 June 2018.

for purposes of N.C.G.S. § 7B-1111(a)(7) in the event that he "withholds his presence, his love, his care, the opportunity to display filial affection, and willfully neglects to lend support and maintenance . . . ." *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962).

We further note that "[o]ur precedents are quite clear—and remain in full force—that '[i]ncarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision.' " *In re M.A.W.*, 370 N.C. 149, 153, 804 S.E.2d 513, 517 (2017) (second alteration in original) (quoting *In re P.L.P.*, 173 N.C. App. 1, 10, 618 S.E.2d 241, 247 (2005), *aff'd per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006)). Although "a parent's options for showing affection while incarcerated are greatly limited, a parent *will not be excused from showing interest in [the] child's welfare by whatever means available*." *In re C.B.C.*, 373 N.C. 16, 19–20, 832 S.E.2d 692, 695 (2019) (quoting *In re D.E.M.*, 257 N.C. App. 618, 621, 810 S.E.2d 375, 378 (2018)). As a result, our decisions concerning the termination of the parental rights of incarcerated persons require that courts recognize the limitations for showing love, affection, and parental concern under which such individuals labor while simultaneously requiring them to do what they can to exhibit the required level of concern for their children. *In re K.N.*, 373 N.C. 274, 283, 837 S.E.2d 861, 867–68 (2020) (stating that "the extent to which a parent's incarceration or violation of the terms and conditions of probation support a finding of neglect depends upon an analysis of the relevant facts and circumstances, including the length of the parent's incarceration").

In the course of determining that respondent-father's parental rights in the children were subject to termination on the grounds of willful abandonment, the trial court found as a fact that:

> 5. [Respondent-father] was not present, but represented by Adam E. Anderson, Esq. [Respondent-father's] Attorney informed the Court that he met with [respondent-father], but was unable to ascertain his wishes as to whether he wished to contest this action or not. [Respondent-father] also indicated he did not want to be present due to wanting to focus his efforts on "trial preparation" for his upcoming criminal matters. [Respondent-father's] Attorney also reached out to [respondent-father's] Federal Attorney, Anthony Martinez, who spoke with [respondent-father] and indicated that he was also unable to ascertain whether [respondent-father] wished to contest this matter. [Respondent-father's] Attorney made a motion to

continue this matter, which was denied. This matter was filed on June 26, 2018 and was noticed on well in advance of the trial date.

. . . .

10. Respondent[-father] has not participated in the care of the [children] in the last six (6) months and has not had any meaningful interaction with the [children] since March 8, 2013.

. . . .

12. Respondent[-father] has pending criminal charges for child related sex offenses which have prevented and prevent him from being a meaningful part of the [children's] live[s].

13. [Amy] was four (4) years old when she disclosed that she was the victim of a sexual assault by her father. Upon disclosure, [the mother] made [respondent-father] leave the home and reported these allegations to the Ashe County Sheriff's Department, who started an investigation. [Respondent-father] was charged with fourteen (14) counts of sexual assault in state court and eight (8) charges in Federal Court. [The mother] did not know the exact names of the charges but did testify that they related to these allegations and other sexual acts including child pornography.

14. The Federal investigation also led to [respondent-father] being charged along with others for sexual acts including child pornography. . . .

15. During the time these acts were committed, [Amy] was two to four (2–4) years old. Her brother, [Andy], was a newborn and nonverbal at the time.. . . .

18. [Respondent-father] has not seen or spoken to the children since March 8, 2013. About eighteen (18) months after this date, he contacted the [mother] requesting to see the children, but this is the only attempt he has made to contact the children.. . . .

22. . . . . [The children] have no bond with [respondent-father. Amy] refers to [respondent-father] as "Aaron", not "dad".

. . . .

24. The [mother] was granted sole legal and physical custody of the children in 2014. [Respondent-father] was not allowed further visitation "absent further orders of the Court." [Respondent-father] has taken no action to file anything with the Court seeking visitation with the children.

25. [Respondent-father] has not made any attempt to contact or see the [children] for the six (6) months next preceding the filing of this action and has not had any meaningful interaction with the [children] since March of 2013.

26. [Respondent-father] has willfully abandoned the juvenile[s] for at least six (6) months immediately preceding the filing of this action. The actions of [respondent-father] manifest a willful determination to forego all parental duties and relinquish all parental claims regarding the minor children. This was done with purpose and deliberation.

27. [Respondent-father's] attorney argued that the actions of [respondent-father] were not willful due to his incarceration. The Court's findings of willfulness are not based on incarceration alone. Despite his incarceration, [respondent-father] is not excused from showing an interest in his children's welfare. The Court has considered other actions that could have been taken by the [respondent-father]. He could have filed a motion for contact or visitation with the Court in the custody action.

28. [Respondent-father] has at all times been able to ascertain the whereabouts of the [children.] [The mother] testified that [respondent-father's] Federal Attorney came to her home a few months ago to ask questions regarding [respondent-father's] criminal case.

Although these findings of fact are, admittedly, rather sparse, we believe that they do suffice to support the trial court's conclusion that respondent-father's parental rights in the children were subject to termination for abandonment pursuant to N.C.G.S. § 7B-1111(a)(7).

In its termination orders, the trial court found[7] as a fact that respondent-father's trial counsel "met with [respondent-father]" and "was unable to ascertain his wishes as to whether he wished to contest this action or not." In addition, the trial court found that respondent-father's trial counsel had "reached out" to the attorney responsible for representing respondent-father in connection with his pending federal criminal cases, who "was also unable to ascertain whether [respondent-father] wished to contest this matter." The trial court further found that Amy "was four (4) years old when she disclosed that she was the victim of a sexual assault by" respondent-father,[8] who "was charged with fourteen (14) counts of sexual assault in state court and eight (8) charges in [f]ederal court." The trial court found that the mother "was granted sole legal and physical custody of the" children by means of an order entered in the District Court, Ashe County, with respondent-father not being "allowed further visitation 'absent further orders of the Court.' " The trial court also found that respondent-father "has not participated in the care of the [children] in the past six (6) months," "has not had any meaningful interaction with the [children] since March 8, 2013," "has taken no action to file anything with the Court seeking visitation with the children," and "has not made any attempt to contact or see the [children] for the six (6) months next preceding the filing of this action and has not had any meaningful interaction with the [children] since March of 2013." The trial court found that, approximately eighteen months after March 8, 2013, respondent-father had "contacted [petitioner-mother] requesting to see the children," with this having been "the only attempt he has made to" do so. In response to respondent-father's contention that "the actions of [respondent-father] were not willful due to his incarceration," the trial court found that, "[d]espite his incarceration, [respondent-father] is not excused from showing an interest in his children's welfare," that "[t]he Court ha[d] considered other actions that could have been taken by" respondent-father, and that respondent-father "could have filed a motion for contact or visitation with the Court in the custody action." Finally, the trial court found that respondent-father "ha[d] at all times been able to ascertain the whereabouts of the [children]" and that the attorney that represented respondent-father in his federal criminal cases "came

7. Respondent-father has not challenged any of the trial court's findings of fact as lacking in sufficient evidentiary support, rendering the trial court's findings binding upon us for purposes of appellate review.

8. The mother testified at the termination hearing that respondent-father had admitted the truth of Amy's accusation.

to [petitioner-mother's] home a few months ago to ask questions regarding [respondent-father's] criminal case." Based upon these findings of fact, the trial court concluded that respondent-father's actions and inactions "manifest a willful determination to forego all parental duties and relinquish all parental claims regarding the" children and that "[t]his was done with purpose and deliberation."

A careful review of the termination orders reveals that the trial court did not conclude that respondent-father's parental rights in the children were subject to termination on the grounds of abandonment solely because he had failed to make direct contact with them in violation of the custody and visitation order. On the contrary, the trial court specifically noted that respondent-father was "not excused from showing an interest in his children's welfare" because of his incarceration and found as a fact that, among other things, the only attempt that respondent-father had made to contact the children had occurred when he communicated with petitioner-mother about eighteen months after his last "meaningful" contact with them. In other words, the trial court found that respondent-father had, with one exception, done nothing to maintain contact with the mother, with whom the children lived and who would know how they were doing,[9] making this case similar to *In re C.B.C.*, 373 N.C. at 23, 832 S.E.2d at 697 (noting, in describing the reasons that the trial court had not erred by finding that a parent's parental rights in a child were subject to termination for abandonment, that the trial court had found that the parent "did not contact [the child's custodians] to inquire into [the child's] well-being"), and *In re B.S.O.*, 234 N.C. App. 706, 711, 760 S.E.2d 59, 64 (2014) (upholding the trial court's determination that a parent had abandoned his children on the grounds that the trial court's findings showed that, "during the relevant six-month period, respondent-father 'made no effort' to remain in contact with his children or their caretakers and neither provided nor offered anything toward their support"), and distinguishable from *In re D.E.M.*, 257 N.C. App. at 621, 810 S.E.2d at 379 (holding that the trial court had erred by finding that an incarcerated parent's parental rights in his child were subject to termination for abandonment based, in part, on the fact that "the trial court's findings . . . do not address, in light of his incarceration,

9. Admittedly, petitioner-mother testified that, at the time that respondent-father contacted her, she "hung up" on him and that, subsequently, "the state put a ban and didn't let him call me." As a result, once again, respondent-father was the author of his own misfortune given that he "demanded" to be allowed to see the children. Moreover, nothing in the mother's testimony suggests that respondent-father was in any way prohibited from communicating with the mother by mail or through intermediaries.

what other efforts [the parent] could have been expected to make to contact [the other parent] and the juvenile").

Although the custody and visitation order that was entered at petitioner-mother's request did preclude respondent-father from having direct contact with the children, it did not place any other limitation upon his ability to interact with or show love, affection, and parental concern for the children.[10] The trial court's findings of fact reflect that respondent-father had the legal right and practical ability to contact the mother directly or through intermediaries for the purpose of inquiring about the children's welfare and asking that she convey his best wishes to them, with nothing in the custody and visitation order serving to prohibit him from doing so. Similarly, nothing in the custody and visitation order prohibited respondent-father from using other persons as a vehicle for the indirect communication of his love, affection, and parental concern for the children. In spite of the fact that respondent-father had the ability to make such inquiries or to request others to do so, the trial court's findings of fact reflect that respondent-father did not ever make contact with petitioner-mother to ask permission to have contact with the children or to otherwise express any love, affection, or parental concern for them during the six-month period prescribed in N.C.G.S. § 7B-1111(a)(7) and that respondent-father would not even clearly tell his trial counsel whether he opposed the allowance of the termination petitions. As a result, we have no difficulty in determining that the trial court's findings do, wholly aside from their references to respondent-father's failure to seek a modification of the custody and visitation order, support a conclusion that respondent-father completely withheld his love, affection, and parental concern for the children, rendering his parental rights in them subject to termination for abandonment pursuant

10. In spite of the fact that respondent-father has contended in his brief before this Court that he would have been unable to make a showing of "changed circumstances" sufficient to support a request for modification of the existing custody and visitation order, respondent-father points to nothing in the relevant order that prohibited him from attempting to obtain permission from the mother to have contact with the children or from requesting the mother or others to relay his best wishes to them. Aside from the fact that this argument seems inconsistent with our recent decision in *In re E.H.P.*, 372 N.C. at 394, 831 S.E.2d at 53, in which we declined to accept a parent's contention that he had failed to seek modification of a temporary custody order because "he 'wasn't in a place in [his] life to—to really be a father or parent,' " respondent-father's exclusive focus upon an attempt to handicap his own likelihood of successfully obtaining a change in the existing custody and visitation order is inconsistent with our insistence that incarcerated parents do what they can in order to show love and affection for their children and the trial court's depiction of defendant's failure to do anything to this effect at all.

to N.C.G.S. § 7B-1111(a)(7) and rendering this case easily distinguishable from decisions such as *In re K.C.*, 247 N.C. App. 84, 87–88, 805 S.E.2d 299, 301–02 (2016) (holding that the trial court's findings of fact failed to support the termination of the mother's parental rights on the grounds of neglect by abandonment despite her failure to visit with the child for the last year prior to the termination hearing given that the father, based upon the advice of a therapist, refused to grant the mother's request for a visit, the fact that the mother had had sporadic visits with the child prior to being denied access to the child, and the fact that the mother had paid court-ordered child support), and *In re T.C.B.*, 166 N.C. App. 482, 485–87, 602 S.E.2d 17, 19–20 (2004) (holding that the trial court's findings of fact failed to support the termination of the father's parental rights in his child on the grounds of abandonment despite the fact that he had not visited with the child for four years prior to the termination hearing and had not sent the child any letters, cards, or gifts during that period given the fact that the mother had denied his request to visit the child during that period, the fact that he had visited with the child on an earlier date, the fact that the attorney representing the father in connection with charges that he had sexually abused his child (that were later dismissed) advised him to refrain from attempting to visit the child during the pendency of the criminal charges, the fact that the father refused to accept an agreement pursuant to which the pending charges would be dismissed in return for his relinquishment of his parental rights, and the fact that the father regularly paid child support).[11]

In seeking to persuade us to reach a different result, respondent-father argues, in essence, that the order prohibiting him from having contact with the children stood as an absolute barrier to his ability to show love, affection, and parental concern for them and that this fact should preclude a finding of abandonment for purposes of N.C.G.S. § 7B-1111(a)(7). Respondent-father appears to take the position that, in the absence of a reasonable belief that he had a chance of prevailing in an action seeking to have the existing custody or visitation arrangements modified, he could not be found to have willfully abandoned the children despite having done absolutely nothing to express any interest in their welfare. However, as we have already demonstrated, the trial court did not find that respondent-father's parental rights in the children were subject to termination for abandonment solely because he failed to make direct contact with the children at a time when he was

11. The conduct of the father in *T.C.B.* stands in stark contrast to that of respondent-father, who, as described in the trial court's findings, would not even take a position concerning whether he did or did not oppose the termination of his parental rights in the children.

incarcerated and prohibited from doing so by the custody and visitation order. Instead, the trial court's findings of fact reflect that respondent-father failed to do anything whatsoever to express love, affection, and parental concern for the children during the relevant six-month period, making this case completely different from *In re K.N.*, 373 N.C. at 284, 837 S.E.2d at 868, in which we held that the trial court's findings were "insufficient to support [its] ultimate determination that respondent's parental rights were subject to termination on the basis of neglect." Thus, respondent-father's argument fails to take the entirety of the trial court's findings of fact into consideration or to come to grips with the ultimate problem created by the fact that the trial court's findings reflect a total failure on his part to take any action whatsoever to indicate that he had any interest in preserving his parental connection with the children.

A decision to overturn the trial court's termination orders in this case would also run afoul of our decisions concerning the manner in which termination of parental rights cases involving incarcerated individuals should be decided. As we have already noted, the fact of incarceration is neither a sword nor a shield for purposes of a termination of parental rights proceeding. Although the fact that he was incarcerated and subject to an order prohibiting him from directly contacting the children created obvious obstacles to respondent-father's ability to show love, affection, and parental concern for the children, it did not render such a showing completely impossible. In spite of the fact that other options for showing love, affection, and parental concern for the children remained open to him, the trial court's findings show that respondent-father remained inactive. For that reason, the effect of a decision to overturn the trial court's termination orders would be to allow respondent-father to use his incarceration and the provisions of the custody and visitation order as a shield against a finding of abandonment contrary to the consistent decisions of this Court and the Court of Appeals.

A decision to overturn the trial court's termination orders would also preclude a trial court from determining that a parent who has been accused of sexually abusing one of his children and incarcerated for a lengthy period of time prior to trial had abandoned his children solely because the parent's spouse and representatives of the State took action to protect the family from any risk that the incarcerated parent would inflict further harm upon the members of the family. A decision to reach the result that respondent-father contends to be appropriate in this case would raise serious questions about the extent, if any, to which an incarcerated individual subject to limitations upon his ability to contact a child that he had allegedly abused could ever be found to have

abandoned his or her children for purposes of N.C.G.S. § 7B-1111(a)(7) regardless of that parent's failure to do what he or she could have done to show love, affection, and parental concern for his or her children. Such a result seems inconsistent with the intent of the General Assembly and the precedents of this Court or the Court of Appeals. As a result, for all of these reasons, we conclude that the trial court's termination orders should be affirmed.

AFFIRMED.

Justice EARLS dissenting.

This case is yet another example of bad facts making bad law. The majority's decision undermines parental rights and expands the definition of abandonment because to do otherwise, in the majority's view, would "raise serious questions about the extent, if any, to which an incarcerated individual subject to limitations upon his ability to contact a child that he had allegedly abused could ever be found to have abandoned his or her children for purposes of N.C.G.S. § 7B-1111(a)(7) regardless of that parent's failure to do what he or she could have done to show love, affection, and parental concern for his or her children." Stated more simply, the majority would like to make sure that a parent's rights to a child can be terminated if the parent abuses the child, even if the parent is incarcerated. While I certainly agree with that objective, the General Assembly has already addressed it. *See* N.C.G.S. § 7B-1111(a)(1) (2019) (allowing for the termination of parental rights if a parent has abused the child). It is therefore unnecessary, as the majority does today, to expand the definition of willful abandonment to include a factual situation as limited as the one before us in this case. I would remand this case to the trial court for additional findings.

As the majority acknowledges, the trial court's order shows that the judgment terminating respondent's parental rights was based on findings that respondent did not have any contact with the children since 2013, that he did not attempt to contact or see them in the six months preceding the termination petition, and that he did not file a motion in the civil custody case to modify the no-contact provisions of the 2014 custody order.[1] None of these findings support the conclusion that respondent willfully abandoned his children.

1. The majority separately claims that the trial court based its conclusions, in part, on respondent's failure to maintain contact with the children's mother. The trial court's order contains no statement to that effect.

First, respondent's mere lack of contact does not demonstrate that he had a purposeful, deliberative, and manifest willful determination to forego all parental duties and relinquish all parental claims to Amy and Andy, because he was prohibited by court order from contacting the children. *Cf. In re T.C.B.*, 166 N.C. App. 482, 486-87, 602 S.E.2d 17, 19–20 (2004) (holding that a trial court's conclusion of willful abandonment was not supported by its findings regarding lack of visits, because a protection plan between DSS and the mother prohibited visitation with the respondent-father, and because the respondent-father's attorney instructed him not to have any contact with the child); *In re K.C.*, 247 N.C. App. 84, 88, 805 S.E.2d 299, 301-02 (2016) (holding that a trial court's conclusion of neglect by abandonment was not supported by its findings regarding lack of visits, because the petitioner-father denied the respondent-mother's request for visitation "on the grounds that the child's therapist determined that visits should be suspended indefinitely"). Willful abandonment under N.C.G.S. § 7B-1111(a)(7) requires *willful* abdication of parental responsibility, which simply does not occur if a parent does not contact his children in compliance with a court order. *Cf. Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962) (defining abandonment "as wilful neglect and refusal to perform the natural and legal obligations of parental care and support"); *id.* at 502, 126 S.E.2d at 608 ("Abandonment requires a wilful intent to escape parental responsibility and conduct in effectuation of such intent."). Respondent's mere lack of contact thus does not support the trial court's conclusion on the ground of willful abandonment.

Second, the fact that respondent did not file a motion seeking to modify the no-contact provisions of the civil custody order similarly does not demonstrate that he willfully abandoned his children. Filing a motion to modify custody or visitation is evidence that a parent does not have a willful determination to forego all parental duties and relinquish all parental claims to a child. *See, e.g.*, *In re D.T.L.*, 219 N.C. App. 219, 222, 722 S.E.2d 516, 518 (2012) ("Having been prohibited by court order from contacting either petitioner or the juveniles, respondent's filing of a civil custody action clearly establishes that he desired to maintain custody of the juveniles and cannot support a conclusion that he had a willful determination to forego all parental duties and relinquish all parental claims to the juveniles."). However, the trial court's findings do not indicate that respondent could have successfully modified the civil custody order with such a motion. Actual modification of custody or visitation requires a parent to show a substantial change in circumstances affecting the welfare of the child. *Shipman v. Shipman*, 357 N.C. 471, 473, 586 S.E.2d 250, 253 (2003) ("It is well established in this jurisdiction

that a trial court may order a modification of an existing child custody order between two natural parents if the party moving for modification shows that a 'substantial change of circumstances affecting the welfare of the child' warrants a change in custody." (quoting *Pulliam v. Smith*, 348 N.C. 616, 619, 501 S.E.2d 898, 899 (1998))); *Charett v. Charett*, 42 N.C. App. 189, 193, 256 S.E.2d 238, 241 (1979) (applicable here because "[c]ustody and visitation are two facets of the same issue."). Given his continued incarceration on pending charges that included child pornography and sexual offenses against Amy, respondent could not show the required substantial change in circumstances necessary to modify the civil custody order. Respondent's failure to file a meritless motion in the civil custody case thus does not support the trial court's conclusion that he willfully abandoned his children.

To be sure, there may be other facts the petitioner could establish and the trial court could find that would support a conclusion that respondent willfully abandoned his children or that another ground for termination of his parental rights exists in this case. But our ruling today should be based solely on the facts that have been found by the trial court in its order terminating respondent's parental rights on the ground of willful abandonment. *See In re C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019) ("We review a trial court's adjudication under N.C.G.S. § 7B-1109 'to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law.' " (quoting *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984))).

The majority makes two additional mistakes on its path to affirming the trial court. First, the trial court's findings concerning respondent's attorneys being "unable to ascertain" whether respondent wished to contest the termination somehow become support for the conclusion that respondent manifested a willful determination to forgo all parental duties and relinquish all parental claims to his children. However accurate the attorneys' statements may have been, those statements are not competent evidence of abandonment. Second, the majority essentially flips the burden of proof by reasoning that a lack of evidence in the record justifies a finding of abandonment because the father was "not excused from showing an interest in his children's welfare." This second point must be addressed in detail.

It remains true that the fact of a parent's incarceration neither requires a court to terminate the incarcerated parent's rights nor prevents a court from doing so. *See In re M.A.W.*, 370 N.C. 149, 153, 804 S.E.2d 513, 517 (2017) ("Our precedents are quite clear—and remain

in full force—that '[i]ncarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision.' " (alteration in original) (quoting *In re P.L.P.*, 173 N.C. App. 1, 10, 618 S.E.2d 241, 247 (2005))). Indeed, this Court recently held that there were sufficient facts to support a finding of abandonment where the order barring the incarcerated father from having any contact with the minor child was merely a temporary custody order, and where there was evidence in the record that the father had the capacity to seek modification of the custody order and failed to do so because he felt he was not able to be a father to his child. *See In re E.H.P.*, 372 N.C. 388, 394, 831 S.E.2d 49, 53 (2019) ("A temporary custody order is by definition provisional, and the order at issue here expressly contemplated the possibility that the no-contact provision would be modified in a future order."); *see also In re C.B.C.*, 373 N.C. at 19–23, 832 S.E.2d at 695–97 (holding that abandonment was established despite the fact that respondent had been incarcerated for approximately three of the relevant six months before the filing of the petition because respondent made no attempt to contact the child while not incarcerated and there was no court order barring him from doing so).

In this case, however, the record is silent as to whether the respondent could successfully modify the court orders that prevented him from having any contact whatsoever with his children. Thus, we are confronted with a situation similar to the situation in *In re K.N.*, 373 N.C. 274, 837 S.E.2d 861 (2020). In that case, we held that

> respondent's incarceration, by itself, cannot serve as clear, cogent, and convincing evidence of neglect. Instead, the extent to which a parent's incarceration or violation of the terms and conditions of probation support a finding of neglect depends upon an analysis of the relevant facts and circumstances, including the length of the parent's incarceration. The trial court's findings do not contain any such analysis.

Id. at 283, 837 S.E.2d at 867–68. Likewise, the bare bones order in this case does not provide sufficient facts to support the conclusion that respondent willfully abandoned his children. The trial court's findings do little more than establish that at the time of the hearing respondent was in jail awaiting trial, under a court order not to contact his children. There are therefore few facts upon which to distinguish this case from *In re K.N.*

Accordingly, the trial court's findings do not support its conclusion that the ground of willful abandonment exists to terminate respondent's parental rights. Willful abandonment was the only basis upon which the trial court terminated respondent's parental rights to the minor children, and I would therefore vacate the trial court's order and remand for further proceedings.

STATE OF NORTH CAROLINA
v.
NICHOLAS OMAR BAILEY

No. 360A19

Filed 1 May 2020

Search and Seizure—search warrant application—affidavit—probable cause—nexus between location and illegal activity

An affidavit submitted with an application for a search warrant established probable cause to search a residence for suspected drugs and related paraphernalia even though the affidavit did not relate any evidence that drugs were actually sold at the residence, where it showed some connection between the residence and an observed illegal drug transaction conducted by two people known to live at the residence.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 831 S.E.2d 894 (N.C. Ct. App. 2019), affirming a judgment entered on 10 July 2018 by Judge Charles H. Henry in Superior Court, Carteret County. Heard in the Supreme Court on 9 March 2020.

Joshua H. Stein, Attorney General, by Jessica Macari, Assistant Attorney General, for the State-appellee.

Richard Croutharmel for defendant-appellant.

DAVIS, Justice.

The issue in this case is whether probable cause existed to support the issuance of a search warrant for defendant's residence. The warrant was issued based on information contained in a law enforcement

officer's affidavit relating to the sale of illegal drugs earlier that day by other residents of the home. Because we are satisfied that the affidavit contained facts that were sufficient to provide a nexus between the residence and suspected criminal activity, we conclude that the warrant was supported by probable cause and affirm the decision of the Court of Appeals.

Factual and Procedural Background

On 25 April 2017, Detective Dallas Rose of the Carteret County Sheriff's Office applied for a warrant to search a residence located at 146 East Chatham Street in Newport, North Carolina, based on events that had occurred earlier that day. In his affidavit, Detective Rose set out the following information: At approximately 5:35 p.m. on that date, Detective Rose was conducting visual surveillance of a secluded parking lot outside of an apartment complex in Newport, along with three other law enforcement officers. Detective Rose observed a blue Jeep Compass pull into the parking lot. He was familiar with the occupants of the Jeep, James White and Brittany Tommasone, based on their previous drug-related activities, which included the sale of illegal narcotics. He also knew that White and Tommasone did not live at the apartment complex and instead lived across town at a residence located at 146 East Chatham Street.

Detective Rose then observed a female passenger get out of a nearby white Mercury Milan and walk over to the blue Jeep. After entering the Jeep and spending approximately 30 seconds inside the vehicle, the woman exited the Jeep and returned to the white Mercury. Both vehicles then exited the parking lot at a high rate of speed and drove away.

Based on his training and experience, Detective Rose believed that he had just witnessed a transaction involving the sale of drugs. Along with two of the other officers, he proceeded to follow the white Mercury and shortly thereafter pulled over the vehicle upon witnessing its driver commit several traffic offenses. The female passenger in the white Mercury, Autumn Taylor, admitted to Detective Rose that she had just purchased a twenty-dollar bag of heroin from White, consumed it in the car, and then thrown the bag out of the car window.

Meanwhile, Detective Tim Corey followed the blue Jeep as it left the parking lot and proceeded to 146 East Chatham Street. Detective Corey observed the two occupants of the Jeep, White and Tommasone, exit the vehicle and go into Apartment 1. Detective Rose was aware that White and Tommasone lived at this address.

The search warrant application submitted by Detective Rose described the residence at 146 East Chatham Street as a "multi family wooden dwelling" divided into "3 separate known living quarters." The application contained a list of the items to be seized from the residence, which included controlled substances, drug paraphernalia, weapons, cell phones, computers, and "[a]ny United States Currency."

After reviewing the search warrant application and supporting affidavit, Carteret County Magistrate Erica Hughes issued a warrant authorizing a search of the residence located at 146 East Chatham Street as well as of any persons present at the time the warrant was executed and of any vehicles located on the premises. Unbeknownst to the officers at the time the warrant was issued, defendant also lived at the apartment on 146 East Chatham Street along with White and Tommasone.

Officers executed the search warrant at approximately midnight and found White and Tommasone, along with defendant and his girlfriend, present at the residence. Defendant was in a bedroom of the apartment in which approximately 41 grams of cocaine, drug paraphernalia, and $924 in cash were also discovered.

Defendant was indicted by a grand jury on 9 October 2017 on a charge of trafficking in cocaine. On 3 July 2018, defendant filed a motion in Superior Court, Carteret County, to suppress evidence seized during the execution of the search warrant based on his contention that the facts contained in the affidavit were insufficient to establish probable cause to search his residence. After conducting a hearing on the motion to suppress, the trial court orally denied defendant's motion on 9 July 2018. Defendant subsequently entered into a plea agreement in which he pled guilty to the offense of trafficking in cocaine, while preserving his right to appeal the denial of his motion to suppress. Defendant was sentenced to 35–51 months imprisonment and ordered to pay a $50,000 fine. On 12 July 2018, the trial court entered a written order memorializing its prior ruling denying defendant's motion to suppress.

Defendant appealed to the Court of Appeals, arguing that the trial court had erred in denying his motion to suppress. The Court of Appeals majority affirmed the trial court's order, holding that the magistrate had a substantial basis for concluding that probable cause existed to issue the warrant. *State v. Bailey*, 831 S.E.2d 894, 895 (N.C. Ct. App. 2019). In a dissenting opinion, Judge Zachary stated her belief that the warrant was not supported by probable cause due to the absence of any information in the affidavit specifically linking the residence to the sale or possession of drugs. *Id.* at 900. Based on the dissent, defendant appealed as of right to this Court on 10 September 2019.

Analysis

The Fourth Amendment to the United States Constitution states that "no Warrants shall issue but upon probable cause." U.S. Const. amend. IV. Our state constitution "likewise prohibits unreasonable searches and seizures and requires that warrants be issued only on probable cause." *State v. Allman*, 369 N.C. 292, 293, 794 S.E.2d 301, 302–03 (2016) (citing N.C. Const. art. I, § 20). Pursuant to these constitutional directives, our General Statutes provide that a search warrant "must be supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe that the items are in the places or in the possession of the individuals to be searched." N.C.G.S. § 15A-244(3) (2019). With regard to a search warrant directed at a residence, probable cause "means a reasonable ground to believe that the proposed search will reveal the presence upon the premises to be searched of the objects sought and that those objects will aid in the apprehension or conviction of the offender." *State v. Campbell*, 282 N.C. 125, 128–29, 191 S.E.2d 752, 755 (1972).

Our prior decisions provide a well-established framework for reviewing determinations of probable cause.

> This standard for determining probable cause is flexible, permitting the magistrate to draw "reasonable inferences" from the evidence in the affidavit supporting the application for the warrant . . . . That evidence is viewed from the perspective of a police officer with the affiant's training and experience, and the commonsense judgments reached by officers in light of that training and specialized experience. Probable cause requires not certainty, but only "*a probability or substantial chance* of criminal activity." The magistrate's determination of probable cause is given "great deference" and "after-the-fact scrutiny should not take the form of a *de novo* review."

State v. McKinney, 368 N.C. 161, 164–65, 775 S.E.2d 821, 824–25 (2015) (citations omitted).

Our case law makes clear that when an officer seeks a warrant to search a residence, the facts set out in the supporting affidavit must show some connection or nexus linking the residence to illegal activity. Such a connection need not be direct, but it cannot be purely conclusory.

For example, in *State v. Arrington*, 311 N.C. 633, 319 S.E.2d 254 (1984), officers obtained a warrant to search a mobile home for evidence

of drug dealing based on the following facts: (1) a confidential informant stated that he had previously purchased marijuana from the defendant and that the defendant was growing marijuana at his mobile home; and (2) a second confidential source stated that he had observed "a steady flow of traffic" in and out of the mobile home within the past month, consisting of many known drug users. *Id.* at 634, 319 S.E.2d at 255. Upon executing the warrant, officers found large amounts of marijuana on the premises. *Id.* at 635, 319 S.E.2d at 256.

We held that the warrant was supported by probable cause because the two tips provided a "strong inference" that the defendant was growing and selling marijuana inside the mobile home. *Id.* at 641–42, 319 S.E.2d at 259–60. We stated that "[a] common sense reading of the information supplied by both informants provides a substantial basis for the *probability* that the defendant had sold marijuana [in the residence] . . . . No more is required under the Fourth Amendment." *Id.* at 642, 319 S.E.2d at 260.

Our decision in *Allman* provides another pertinent illustration. In that case, three roommates were pulled over while riding in a car together, and a search of their vehicle revealed the presence of a large quantity of marijuana and over $1,600 in cash. *Allman*, 369 N.C. at 292–93, 794 S.E.2d at 302. An officer applied for a warrant to search their home for evidence of drug dealing and asserted in his affidavit that: (1) large quantities of drugs and cash were found in their car; (2) two of the occupants of the car had a criminal history of drug offenses; and (3) the occupants had lied to officers about where they lived. *Id.* at 295–96, 794 S.E.2d at 304–05. The affidavit also stated, "based on [the officer's] training and experience, that drug dealers typically keep evidence of drug dealing at their homes." *Id.* A warrant was issued, and a search of the residence revealed the presence of illegal narcotics and drug paraphernalia. *Id.* at 296, 794 S.E.2d at 304.

Based on the facts contained in the affidavit, when viewed in light of the officer's training and experience, we determined that "it was reasonable for the magistrate to infer that there would be evidence of drug dealing" found at the residence. *Id.* at 296–97, 794 S.E.2d at 305. We acknowledged that "nothing in [the officer's] affidavit directly linked defendant's home with evidence of drug dealing" but stated that such direct evidence is not always necessary to establish probable cause. *Id.* at 297, 794 S.E.2d at 305.

In *Campbell*, conversely, this Court determined that probable cause to search a residence was lacking when the facts set out in the officer's

affidavit failed to establish any meaningful connection whatsoever between the illegal activity and the residence. *Campbell*, 282 N.C. at 128–32, 191 S.E.2d at 755–57. In that case, an officer sought a warrant to search the residence of three suspected drug dealers for evidence of illegal drugs. *Id.* at 130, 191 S.E.2d at 756. The warrant stated, in part, as follows:

> All of the . . . subjects live in the house across from Ma's Drive-in on Hwy. 55. They all have sold narcotics to Special Agent J. M. Burns of the SBI and are all actively involved in drug sales to Campbell College students; this is known from personal knowledge of affiant, interviews with reliable confidential informants and local police officers.

Id.

A warrant was issued, and a search of the residence revealed 289 LSD tablets on the premises. *Id.* at 126–27, 191 S.E.2d at 754. The defendant argued on appeal that no probable cause had existed to support the issuance of the search warrant. *Id.* at 127, 191 S.E.2d at 754. We agreed that the affidavit supporting the warrant was "fatally defective" because it "failed to implicate the premises to be searched." *Id.* at 131, 191 S.E.2d at 757. We explained that "[p]robable cause cannot be shown 'by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the underlying circumstances upon which that belief is based.' " *Id.* at 130–31, 191 S.E.2d at 756 (quoting *United States v. Ventresca*, 380 U.S. 102, 108–09 (1965)).

> [The affidavit] details no underlying facts and circumstances from which the issuing officer could find that probable cause existed *to search the premises described.* The affidavit implicates those premises *solely as a conclusion of the affiant.* Nowhere in the affidavit is there any statement that narcotic drugs were ever possessed or sold in or about the dwelling to be searched. Nowhere in the affidavit are any underlying circumstances detailed from which the magistrate could reasonably conclude that the proposed search would reveal the presence of illegal drugs in the dwelling. The inference the State seeks to draw from the contents of this affidavit—that narcotic drugs are illegally possessed on the described premises—does not reasonably arise from the facts alleged.

Id. at 131, 191 S.E.2d at 757. Accordingly, we concluded that the warrant was not supported by probable cause and that the evidence gathered as a result of the search was inadmissible. *Id.* at 132, 191 S.E.2d at 757.

Applying these principles to the present case, we are satisfied that the magistrate had a sufficient basis to conclude that probable cause existed to search the residence on East Chatham Street based on the facts contained in Detective Rose's affidavit. His affidavit included the following key information: (1) Detective Rose personally observed an encounter between Taylor, White, and Tommasone in a secluded parking lot that he believed—based on his training and experience—likely involved the sale of drugs; (2) Detective Rose knew White and Tommasone had a history of dealing drugs; (3) when Taylor was pulled over shortly after leaving the parking lot, she confirmed that she had just purchased heroin from White; (4) an officer observed White and Tommasone travel from the scene of the drug deal to the residence on East Chatham Street, exit the vehicle, and go inside the apartment; and (5) Detective Rose knew that this address was, in fact, where White and Tommasone lived.

As in *Allman* and *Arrington*, these facts supported a reasonable inference that a link existed between the apartment on East Chatham Street and the sale of drugs by White and Tommasone. The information set out in Detective Rose's affidavit allowed the magistrate to infer that evidence related to this criminal activity—such as drugs, drug paraphernalia, proceeds from drug sales, or associated items—would likely be found at the residence.[1]

It is true that Detective Rose's affidavit did not contain any evidence that drugs were actually being sold at the apartment. But our case law makes clear that such evidence was not necessary in order for probable cause to exist. Rather, the affiant was simply required to demonstrate *some* nexus between the apartment on East Chatham Street and criminal activity. Because Detective Rose's affidavit set out information that established such a nexus, we are unable to conclude that the magistrate lacked a sufficient basis for determining that probable cause existed to search the apartment.

While defendant relies heavily on our decision in *Campbell* in arguing for a different result, we believe that the present case is readily

1. Indeed, at a bare minimum, the affidavit clearly permitted an inference that the proceeds from the sale of the heroin to Taylor several hours earlier would be located at the apartment.

distinguishable from *Campbell*. In that case, there was no information contained in the officer's affidavit to support a reasonable inference that the residence at issue was in any way connected to the suspects' alleged drug dealing. Rather, the affidavit merely relied on the bare fact that the suspects lived there. Here, conversely, Detective Rose's affidavit provided a link between the apartment and criminal activity.

To be sure, Detective Rose could have included greater detail in his affidavit as to why—based on his training and experience—he believed that evidence of criminal activity was likely to be present in the residence. Nevertheless, viewing the affidavit in its totality and remaining mindful of the deference that we accord to a magistrate's determination of probable cause, we conclude that the trial court did not err in denying defendant's motion to suppress. In so holding, we break no new legal ground and instead simply apply well-settled principles of law to the facts presented in this case.

Conclusion

For the reasons stated above, we affirm the decision of the Court of Appeals.

AFFIRMED.

STATE OF NORTH CAROLINA
v.
SHAWN PATRICK ELLIS

No. 340A19

Filed 1 May 2020

Search and Seizure—reasonable suspicion—disorderly conduct—vehicle passenger—"flipping the bird"

A state trooper lacked reasonable suspicion that defendant was engaged in disorderly conduct where the trooper saw a vehicle traveling down the road with defendant's arm out of the window making a pumping-up-and-down motion with his middle finger. The trooper did not know whether defendant's gesture was directed at him or at another driver, and the facts were insufficient to lead a reasonable officer to believe that defendant was intending to or was likely to provoke a violent reaction from another driver that would cause a breach of the peace.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 832 S.E.2d 750 (N.C. Ct. App. 2019), affirming a judgment entered on 13 March 2018 by Judge Karen Eady-Williams in Superior Court, Stanly County. This matter was calendared for argument in the Supreme Court on 11 March 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Joshua H. Stein, Attorney General, by Kimberly N. Callahan, Assistant Attorney General, for the State-appellee.

Glenn Gerding, Appellate Defender, by Michele A. Goldman, Assistant Appellate Defender, for defendant-appellant.

Irena Como; and Kirkland & Ellis LLP, by Stefan Atkinson and Joseph Myer Sanderson, for American Civil Liberties Union of North Carolina Legal Foundation, amicus curiae.

HUDSON, Justice.

Here we must decide whether the Court of Appeals erred by affirming the trial court's denial of defendant's motion to suppress evidence. The trial court found that there was reasonable suspicion that criminal

activity was afoot to justify the law enforcement officer's stop when defendant signaled with his middle finger from the passenger side window of a moving vehicle. Because we conclude that there was no reasonable suspicion to justify the stop, we reverse the decision of the Court of Appeals and remand this case to the Court of Appeals for further remand to the trial court for further proceedings not inconsistent with our decision.

I. Facts and Procedural Background

Around lunch time on 9 January 2017, a few days after a significant snowstorm, Trooper Paul Stevens of the North Carolina State Highway Patrol was flagged down in Stanly County by a stranded motorist who had run out of gas. Temperatures were below freezing, and Trooper Stevens stopped to help. Trooper Stevens called for an officer with the Albemarle Police Department to help him render aid to the motorist. Officer Adam Torres arrived at the scene. Both Trooper Stevens and Officer Torres had their blue lights activated while their patrol cars were positioned on the side of the road.

While assisting the stranded motorist, Trooper Stevens turned his attention to another car traveling on the roadway. Defendant, a passenger in a small white SUV, had his arm outside of the window and was making a back-and-forth waving motion with his hand. As Trooper Stevens turned to look towards the car, defendant's gesture changed from a waving motion to a pumping up-and-down motion with his middle finger. Believing that defendant was committing the crime of disorderly conduct, Trooper Stevens got into his patrol car to pursue and stop the SUV.

Trooper Stevens pursued the vehicle for approximately half a mile with his blue lights still activated. Trooper Stevens did not observe the SUV break any traffic laws during his pursuit, and the SUV pulled over to the side of the road without incident.

When Trooper Stevens asked the driver and defendant for identification, they both initially refused. After about a minute, the driver provided her identification, but defendant still refused. Trooper Stevens took defendant to his patrol car, and eventually, defendant agreed to provide his name and date of birth. Trooper Stevens issued defendant a citation for resisting, delaying, or obstructing an officer under N.C.G.S. § 14-223.

At the trial court, defendant moved to suppress Trooper Stevens' testimony, arguing that there was no reasonable suspicion to justify the

stop. The trial court orally denied the motion, finding that there was reasonable suspicion for the stop.

Defendant gave notice that he intended to appeal from the trial court's denial of his motion to suppress and then pleaded guilty to resisting, delaying, or obstructing a public officer.

At the Court of Appeals, defendant again argued that the stop was not valid because Trooper Stevens lacked reasonable suspicion that defendant was engaged in disorderly conduct. The State argued that the stop fell within the community caretaking exception to the Fourth Amendment and, therefore, that Trooper Stevens did not need reasonable suspicion to justify the stop. The Court of Appeals unanimously decided that the community caretaking exception did not apply to the facts here. Instead, the majority at the Court of Appeals concluded there was reasonable suspicion for the stop and affirmed the trial court's denial of defendant's motion to suppress. The dissenting judge disagreed and would have concluded that the stop was not supported by reasonable suspicion.

Defendant appealed to this Court on the basis of the dissenting opinion. In its brief here, the State acknowledges that its sole argument in the Court of Appeals involved the community caretaking exception, and that the court unanimously rejected that argument.[1] In fact, the State agrees that the specific, articulable facts in the record do not establish reasonable suspicion of the crime of disorderly conduct.

Because we agree, we reverse the decision of the Court of Appeals.

II. Analysis

We review a trial court's denial of a motion to suppress to determine "whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Jackson*, 368 N.C. 75, 78, 772 S.E.2d 847, 849 (2015) (quoting *State v. Otto*, 366 N.C. 134, 136, 726 S.E.2d 824, 827 (2012)). However, findings of fact are only required "when there is a material conflict in the evidence." *State v. Bartlett*, 368 N.C. 309, 312, 776 S.E.2d 672, 674 (2015). Where, as here, there is no conflict in the evidence, the trial court's findings can be inferred from its decision. *Id.* (citing *State v. Munsey*, 342 N.C. 882, 885, 467 S.E.2d 425, 427 (1996)). In these circumstances, we review de novo whether the findings inferred from

1. The community caretaking exception was not the basis for the dissenting opinion and is not otherwise before this Court.

the trial court's decision support the ultimate legal conclusion reached by the trial court. *State v. Nicholson*, 371 N.C. 284, 288, 813 S.E.2d 840, 843 (2018).

Refusing to identify oneself to a police officer during a *valid* stop may constitute a violation of N.C.G.S. § 14-223. *See State v. Friend*, 237 N.C. App. 490, 493, 768 S.E.2d 146, 148 (2014) ("We hold that the failure to provide information about one's identity during a lawful stop can constitute resistance, delay, or obstruction within the meaning of [N.C.G.S.] § 14-223." (citation omitted)); N.C.G.S. § 14-223 (2017). The primary issue before us is whether or not Trooper Stevens's stop was valid.

> The United States Supreme Court has long held that the Fourth Amendment permits a police officer to conduct a brief investigatory stop of an individual based on reasonable suspicion that the individual is engaged in criminal activity. The Fourth Amendment permits brief investigative stops when a law enforcement officer has a particularized and objective basis for suspecting the particular person stopped of criminal activity. The standard takes into account the totality of the circumstances—the whole picture. Although a mere hunch does not create reasonable suspicion, the level of suspicion the standard requires is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause.
>
> As this Court has explained, the stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. . . . Therefore, when a criminal defendant files a motion to suppress challenging an investigatory stop, the trial court can deny that motion only if it concludes, after considering the totality of the circumstances known to the officer, that the officer possessed reasonable suspicion to justify the challenged seizure.

Nicholson, 371 N.C. at 288–89, 813 S.E.2d at 843–44 (cleaned up) (citations omitted).

The trial court concluded that there was reasonable suspicion to justify the stop, and the Court of Appeals agreed. But reviewing the record before us de novo, we are unable to conclude that there were specific and articulable facts known to Trooper Stevens which would

lead a reasonable officer to suspect that defendant was engaged in disorderly conduct.

"Disorderly conduct is a public disturbance intentionally caused by any person who . . . [m]akes or uses any utterance, gesture, display or abusive language which is intended and plainly likely to provoke violent retaliation and thereby cause a breach of the peace." N.C.G.S. § 14-288.4(a)(2) (2017).

The following facts can be inferred from Trooper Stevens' testimony: defendant was waving from the passenger window of an SUV and, a few seconds later, began to gesture with his middle finger; Trooper Stevens did not know whether defendant's gesture was directed at him or at another driver; and, after pursuing the vehicle for approximately half a mile, Trooper Stevens did not observe any traffic violations or other suspicious behavior.

We conclude that these facts alone are insufficient to provide reasonable suspicion that defendant was engaged in disorderly conduct. The fact that Trooper Stevens was unsure of whether defendant's gesture may have been directed at another vehicle does not, on its own, provide reasonable suspicion that defendant intended to or was plainly likely to provoke violent retaliation from another driver. Likewise, the mere fact that defendant's gesture changed from waving to "flipping the bird" is insufficient to conclude defendant's conduct was likely to cause a breach of the peace. Based on the facts in the record, we are unable to infer that, by gesturing with his middle finger, defendant was intending to or was likely to provoke a violent reaction from another driver that would cause a breach of the peace.

Thus, we conclude that it was error for the trial court to find that there was reasonable suspicion of disorderly conduct to justify the stop.[2]

III. Conclusion

In conclusion, there was no reasonable suspicion of disorderly conduct to justify Trooper Stevens' stop, and it was error for the trial court

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2. Because we conclude that there was no reasonable suspicion for the stop, we need not address defendant's First Amendment arguments. *State v. Hyleman*, 324 N.C. 506, 510, 379 S.E.2d 830, 833 (1989) ("Having decided upon statutory grounds that defendant's motion to suppress should have been allowed, this Court will not decide the same issue on constitutional grounds.") (citing *State v. Creason*, 313 N.C. 122, 326 S.E.2d 24 (1985); *State v. Blackwell*, 246 N.C. 642, 99 S.E.2d 867 (1957); *State v. Jones*, 242 N.C. 563, 89 S.E.2d 129 (1955)).

to deny defendant's motion to suppress. We reverse the decision of the Court of Appeals and remand this case to the Court of Appeals for further remand to the trial court for further proceedings not inconsistent with our decision.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA
v.
CEDRIC THEODIS HOBBS JR.

No. 263PA18

Filed 1 May 2020

1. Jury—selection—Batson challenge—prima facie case—mootness

Whether an African-American first-degree murder defendant established a prima facie case of discrimination in a *Batson* challenge (*Batson*'s first step) was a moot question because the State provided purportedly race-neutral reasons for its peremptory challenges against black potential jurors (*Batson*'s second step) and the trial court ruled on them (*Batson*'s third step).

2. Jury—selection—Batson challenge—pretext—erroneous analysis

Where an African-American first-degree murder defendant lodged *Batson* challenges to the State's exercise of peremptory challenges against two black potential jurors, the trial court erred in its analysis that ultimately concluded the State's use of its peremptory challenges was not based on race. The trial court erroneously considered the peremptory challenges exercised by defendant; failed to explain how it weighed the totality of the circumstances, including the historical evidence of discrimination raised by defendant; and erroneously focused only on whether the prosecution asked white and black jurors different questions, rather than also comparing their answers.

3. Jury—selection—Batson challenge—pretext—erroneous analysis

Where an African-American first-degree murder defendant lodged a *Batson* challenge to the State's exercise of a peremptory challenge against a black potential juror, the Court of Appeals erred in its analysis that ultimately concluded the State's use of its peremptory challenge was not based on race. That court failed to

conduct a comparative juror analysis and failed to weigh all the evidence presented by defendant, including historical evidence of discrimination.

Justice NEWBY dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 260 N.C. App. 394, 817 S.E.2d 779 (2018), finding no error after appeal from judgments entered on 18 December 2014 by Judge Robert F. Floyd in Superior Court, Cumberland County. Heard in the Supreme Court on 3 February 2020.

Joshua H. Stein, *Attorney General*, *by Amy Kunstling Irene*, *Special Deputy Attorney General*, *for the State-appellee.*

Glenn Gerding, *Appellate Defender*, *by Sterling Rozear*, *Assistant Appellate Defender*, *for defendant-appellant.*

Donald H. Beskind, *Robert S. Chang*, *and Taki V. Flevaris for Fred T. Korematsu Center for Law and Equality*, *amicus curiae.*

David Weiss, *James E. Coleman Jr.*, *and Elizabeth Hambourger for Coalition of State and National Criminal Justice and Civil Rights Advocates*, *amici curiae.*

EARLS, Justice.

Cedric Theodis Hobbs Jr. is an African-American male who was indicted for the murder of a young white man and for a further eight additional felonies including armed robbery and kidnapping against three other white victims. Before trial, Mr. Hobbs filed a motion pursuant to the Racial Justice Act which included information about prior capital cases in Cumberland County. During jury selection in his capital trial, Mr. Hobbs made a number of objections arguing that the State was exercising its peremptory challenges in a racially discriminatory manner. He pursues two of these objections in arguments before this Court. At the time of his final objection, the State had used eight out of eleven of its peremptory challenges against black jurors. While it had accepted eight and excused eight black jurors at that time, the State had accepted twenty and excused two white jurors.

On 12 December 2014, Mr. Hobbs was found guilty of one count of first-degree murder by malice, premeditation and deliberation, and also

under the felony murder rule; two counts of robbery with a dangerous weapon; two counts of attempted robbery with a dangerous weapon; and one count of felonious conspiracy to commit robbery with a dangerous weapon. He was sentenced to life imprisonment without parole for the first-degree murder conviction and one count of attempted robbery with a dangerous weapon, as well as three consecutive sentences of 73 to 97 months for each of the two convictions for robbery with a dangerous weapon and for the other attempted robbery with a dangerous weapon conviction. Mr. Hobbs was also sentenced to 29 to 44 months for conspiracy to commit robbery with a dangerous weapon.

Mr. Hobbs appealed to the Court of Appeals. On appeal, he argued that the trial court should have accepted his proffered jury instruction concerning his mental capacity to consider the consequences of his actions and should have granted three objections that he made under the decision of the Supreme Court of the United States in *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986), which prohibits the use of race-based peremptory challenges during jury selection. In a unanimous opinion, the Court of Appeals rejected Mr. Hobbs's arguments, concluding that Mr. Hobbs received a fair trial, free from prejudicial error. *State v. Hobbs*, 260 N.C. App. 394, 409, 817 S.E.2d 779, 790 (2018). Mr. Hobbs then sought discretionary review in this Court, arguing that the Court of Appeals erred in its analysis of his *Batson* claims with respect to three jurors. We agree. As to the first two jurors, the Court of Appeals rejected Mr. Hobbs's argument "that the trial court's ruling [that Hobbs had failed to establish a prima facie case of discrimination] became moot." *Hobbs*, 260 N.C. App. at 404, 817 S.E.2d at 787. This was error. As to the third juror, the Court of Appeals affirmed the trial court's determination that Mr. Hobbs had not met his ultimate burden of showing that the strike was motivated by race. This, also, was error. As to all three jurors, we remand for reconsideration of the third stage of the *Batson* analysis, namely whether Mr. Hobbs proved purposeful discrimination in each case.

Background

The evidence at trial tended to show that Mr. Hobbs robbed the Cumberland Pawn and Loan Shop on 6 November 2010. Kyle Harris, Derrick Blackwell, and Sean Collins were all working and present at the pawn shop on that date. During the robbery, Mr. Hobbs shot Kyle Harris, a nineteen-year-old college student, in the chest, killing him. At trial, Mr. Hobbs presented a defense of diminished capacity, arguing that his troubled upbringing, severe childhood traumas, poor mental health, and substance abuse affected his mental ability at the time of the offenses. *Hobbs*, 260 N.C. App. at 396–99, 817 S.E.2d at 783–84.

The jury pool for Mr. Hobbs's capital trial was divided into panels of twelve, which were called up in subsequent rounds of jury selection as the parties progressed through voir dire. Mr. Hobbs made his first *Batson* objection during the third round of jury selection after the State excused jurors Brian Humphrey and Robert Layden, both of whom were black. At the time of those strikes, the State had issued peremptory challenges against eight jurors, two of whom were nonblack and six of whom were black. Of the thirty-one qualified jurors tendered to the State, the State had excused two out of twenty white jurors (10%) and six out of eleven black jurors (54.5%).

Mr. Hobbs argued that the facts above, along with the fact that he was a black male accused of robbing multiple white victims and murdering one white victim, the similarities between the answers provided by the excused black jurors and the accepted nonblack jurors, and the history of racial discrimination in jury selection in the county where Mr. Hobbs was being prosecuted all worked together to establish a prima facie case that the State had impermissibly based its peremptory challenges on the race of the jurors. The trial court determined that Mr. Hobbs had not made out a prima facie case of discrimination. However, the trial court asked the State, for purposes of the record, to explain the State's use of peremptory challenges against the black jurors it had excused up to that point. After the State offered its reasons, the trial court gave Mr. Hobbs an opportunity to reply and argue that the State's reasons were pretextual. The trial court described this as "a full hearing on the defendant's *Batson* claim." Following the hearing, the trial court ruled that the State's peremptory challenges were not made on the basis of race.

Mr. Hobbs made another objection[1] pursuant to *Batson* during the fourth round of jury selection, following the State's use of a peremptory challenge to strike William McNeill from the jury. At the time, the State had used eight out of eleven peremptory challenges against black jurors. At that point, the trial court determined that a prima facie case had been made out by the defense. Accordingly, the trial court required the State to provide race-neutral reasons for its use of a peremptory challenge to strike juror McNeill. The trial court allowed Mr. Hobbs to respond to the State's reasons and, during argument between the parties, noted that the State had accepted eight black jurors in total and issued peremptory challenges against eight black jurors. The trial court concluded that

1. Only those objections which Mr. Hobbs argues to this Court are detailed here.

the State's use of a peremptory challenge against juror McNeill was not based on race.

Reviewing the decision of the trial court, the Court of Appeals held that, notwithstanding the fact that the trial court had requested race-neutral explanations for the strikes of jurors Humphrey and Layden and the fact that it made an ultimate ruling on whether the strikes were motivated by race, the question of whether Mr. Hobbs made out a prima facie case of discrimination as to jurors Humphrey and Layden was not moot. *Hobbs*, 260 N.C. App. at 404, 817 S.E.2d at 787. The Court of Appeals then concluded that Mr. Hobbs had failed to establish a prima facie case of discrimination. *Id.* at 405, 817 S.E.2d at 787–88. As to juror McNeill, the Court of Appeals affirmed the trial court's ruling that Mr. Hobbs had failed to prove racial discrimination in the State's peremptory challenge. *Id.* at 407, 817 S.E.2d at 789. Mr. Hobbs petitioned this Court for discretionary review, which we granted.

Standard of Review

Mr. Hobbs claims that the State's peremptory challenges, detailed above, were impermissibly based on the race of the jurors. The trial court has the ultimate responsibility of determining "whether the defendant has satisfied his burden of proving purposeful discrimination." *State v. Golphin*, 352 N.C. 364, 427, 533 S.E.2d 168, 211 (2000) (quoting *State v. Bonnett*, 348 N.C. 417, 433, 502 S.E.2d 563, 575 (1998)). We give this determination "great deference," overturning it only if it is clearly erroneous. *Id.* (citations omitted). Indeed, we have previously held that "[t]rial judges, who are 'experienced in supervising voir dire,' and who observe the prosecutor's questions, statements, and demeanor firsthand, are well qualified to 'decide if the circumstances concerning the prosecutor's use of peremptory challenges create[ ] a prima facie case of discrimination against black jurors.' " *State v. Chapman*, 359 N.C. 328, 339, 611 S.E.2d 794, 806 (2005) (alteration in original) (quoting *Batson*, 476 U.S. at 97, 106 S. Ct. at 1723.) As with any other case, issues of law are reviewed de novo. *See, e.g.*, *State v. Parisi*, 372 N.C. 639, 649, 831 S.E.2d 236, 243 (2019) (legal conclusions " 'are reviewed de novo and are subject to full review,' with an appellate court being allowed to 'consider[ ] the matter anew and freely substitute[ ] its own judgment for that of the lower tribunal.' " (alterations in original) (quoting *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011))).

Analysis

When a defendant claims that the State has exercised its peremptory challenges in a racially discriminatory manner, a trial court conducts a

three-step analysis pursuant to the decision of the Supreme Court of the United States in *Batson v. Kentucky*. *See Snyder v. Louisiana*, 552 U.S. 472, 476–77, 128 S. Ct. 1203, 1207 (2008).

***Prima facie* case**

"[A] defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Johnson v. California*, 545 U.S. 162, 170, 125 S. Ct. 2410, 2417 (2005); *see Batson*, 476 U.S. at 93–94, 106 S. Ct. at 1721 (stating that a defendant makes a prima facie case of discrimination "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose" (citation omitted)). "[A] prima facie showing of racial discrimination[ ] is not intended to be a high hurdle for defendants to cross. Rather, the showing need only be sufficient to shift the burden to the State to articulate race-neutral reasons for its peremptory challenge." *State v. Waring*, 364 N.C. 443, 478, 701 S.E.2d 615, 638 (2010) (quoting *State v. Hoffman*, 348 N.C. 548, 553, 500 S.E.2d 718, 722 (1998)) (alteration in original). So long as a defendant provides evidence from which the court can infer discriminatory purpose, a defendant has established a prima facie case and has thereby transferred the burden of production to the State. *See*, *e.g.*, *State v. Porter*, 326 N.C. 489, 497, 391 S.E.2d 144, 150 (1990) ("When a defendant makes out a prima facie case, the burden of production shifts to the State to come forward with a neutral explanation for each peremptory strike." (cleaned up)).

In making this showing, a defendant is entitled to "rely on 'all relevant circumstances' to raise an inference of purposeful discrimination." *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231, 240, 125 S. Ct. 2317, 2325 (2005) (citation omitted). Our prior cases have identified a number of factors to consider when determining whether a defendant has made out a prima facie case of discrimination, which

> include the defendant's race, the victim's race, the race of the key witnesses, questions and statements of the prosecutor which tend to support or refute an inference of discrimination, repeated use of peremptory challenges against blacks such that it tends to establish a pattern of strikes against blacks in the venire, the prosecution's use of a disproportionate number of peremptory challenges to strike black jurors in a single case, and the State's acceptance rate of potential black jurors.

*State v. Quic*k, 341 N.C. 141, 145, 462 S.E.2d 186, 189 (1995). These are not the only factors to consider. For example, a court must consider historical evidence of discrimination in a jurisdiction. *See, e.g.*, *Miller-El v. Cockrell* (*Miller-El I*), 537 U.S. 322, 346, 123 S. Ct. 1029, 1044 (2003); *see also Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019) (stating that a criminal defendant raising a *Batson* objection may present evidence of a "relevant history of the State's peremptory strikes in past cases" to support a claim of discrimination).

Importantly, the burden on a defendant at this stage is one of production, not of persuasion. That is, a defendant need only provide evidence supporting an inference discrimination has occurred. At the stage of presenting a prima facie case, the defendant is not required to persuade the court conclusively that discrimination has occurred. The United States Supreme Court has made this clear:

> Indeed, *Batson* held that because the petitioner had timely objected to the prosecutor's decision to strike "all black persons on the venire," the trial court was in error when it "flatly rejected the objection without requiring the prosecutor to give an explanation for his action." 476 U.S.[ ] at 100, 106 S.[ ]Ct. 1712. We did not hold that the petitioner had proved discrimination. Rather, we remanded the case for further proceedings because the trial court failed to demand an explanation from the prosecutor—i.e., to proceed to *Batson*'s second step—despite the fact that the petitioner's evidence supported *an inference* of discrimination. *Ibid.*
>
> Thus, in describing the burden-shifting framework, we assumed in *Batson* that the trial judge would have the benefit of all relevant circumstances, including the prosecutor's explanation, before deciding whether it was more likely than not that the challenge was improperly motivated. We did not intend the first step to be so onerous that a defendant would have to persuade the judge—on the basis of all the facts, some of which are impossible for the defendant to know with certainty—that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.

Johnson, 545 U.S. at 169–70, 125 S. Ct. at 2417. The Court then reiterated the point:

> The first two *Batson* steps govern the production of evidence that allows the trial court to determine the persuasiveness of the defendant's constitutional claim. "It is not until the *third* step that the persuasiveness of the justification becomes relevant—the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination."

Johnson, 545 U.S. at 171, 125 S. Ct. at 2417–18 (quoting *Purkett v. Elem*, 514 U.S. 765, 768, 115 S. Ct. 1769, 1771 (1995)).

Indeed, language in our own cases affirms this. *See*, *e.g.*, *Quick*, 341 N.C. at 144, 462 S.E.2d at 188 ("Therefore, to make out a prima facie case of discrimination, a defendant need only show that the relevant circumstances raise an inference that the prosecutor used peremptory challenges to remove potential jurors solely because of their race.");[2] *Porter*, 326 N.C. at 497, 391 S.E.2d at 150 (referring to "the burden of production" which shifts from a defendant to the State once a defendant establishes a prima facie case).

Race-neutral reasons

If a defendant has made a prima facie showing, the analysis proceeds to the second step where the State is required to provide race-neutral reasons for its use of a peremptory challenge. *Flowers*, 139 S. Ct. at 2243.

> The State's explanation must be clear and reasonably specific, but does not have to rise to the level of justifying a challenge for cause. *See Bonnett*, 348 N.C. at 433, 502 S.E.2d at 574; *State v. Porter*, 326 N.C. 489, 498, 391 S.E.2d 144, 151 (1990). Moreover, " 'unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.' " *Bonnett*, 348 N.C. at 433, 502 S.E.2d at 574–75 (quoting *Hernandez*,

2. As we recognized in *State v. Waring*, this statement is incorrect to the extent that it suggests a strike is only impermissible if race is the sole reason. Instead, "the third step in a *Batson* analysis is the less stringent question whether the defendant has shown 'race was *significant* in determining who was challenged and who was not.' " *Waring*, 364 N.C. 443, 480, 701 S.E.2d 615, 639 (2010) (quoting *Miller-El II*, 545 U.S. 231, 252, 125 S. Ct. 2317, 2332 (2005)).

> 500 U.S. at 360, 114 L. Ed. 2d at 406); *see also Purkett v. Elem*, 514 U.S. 765, 768-69, 131 L. Ed. 2d 834, 839-40, 115 S. Ct. 1769 (1995); *State v. Barnes*, 345 N.C. 184, 209-10, 481 S.E.2d 44, 57, *cert. denied*, 522 U.S. 876, 118 S. Ct. 196, 139 L. Ed. 2d 134 (1997), *and cert. denied*, 523 U.S. 1024, 140 L. Ed. 2d 473, 118 S. Ct. 1309 (1998). In addition, the second prong provides the defendant an opportunity for surrebuttal to show the State's explanations for the challenge are merely pretextual. *See State v. Gaines*, 345 N.C. 647, 668, 483 S.E.2d 396, 408, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177, 118 S. Ct. 248 (1997); *State v. Robinson*, 330 N.C. 1, 16, 409 S.E.2d 288, 296 (1991).

Golphin, 352 N.C. at 426, 533 S.E.2d at 211. Therefore, at *Batson*'s second step, the State offers explanations for the strike which must, on their face, be race-neutral. If they are, then the court proceeds to the third step.

Pretext

At the third step of the analysis, the defendant bears the burden of showing purposeful discrimination. *Waring*, 364 N.C. at 475, 701 S.E.2d at 636; *see also*, *State v. Wright*, 189 N.C. App. 346, 352–54, 658 S.E.2d 60, 64–65 (2008) (where the State failed to meet its burden of offering race-neutral reasons for the exercise of each of its peremptory challenges to strike black jurors, a *Batson* violation was established). "The trial court must consider the prosecutor's race-neutral explanations in light of all of the relevant facts and circumstances, and in light of the arguments of the parties." *Flowers*, 139 S. Ct. at 2243. At the third step, the trial court "must determine whether the prosecutor's proffered reasons are the actual reasons, or whether the proffered reasons are pretextual and the prosecutor instead exercised peremptory strikes on the basis of race." *Id*. at 2244. "The ultimate inquiry is whether the State was 'motivated in substantial part by discriminatory intent.' " *Id*. (quoting *Foster v. Chatman*, 136 S. Ct. 1737, 1754 (2016)).

Mr. Hobbs presents two issues for our consideration. First, Mr. Hobbs argues that the first step, whether he established a prima facie case of discrimination, became moot as to jurors Humphrey and Layden once the prosecution offered its reasons for excusing those jurors and trial court ruled on the ultimate issue of whether the prosecutor's strikes were motivated by race. Second, he argues that the trial court erred in its ultimate determination that the State was not impermissibly motivated

by race in its strikes of jurors Humphrey, Layden, and McNeill. We address each argument in turn.[3]

Mootness

[1] Where the State has provided reasons for its peremptory challenges, thus moving to *Batson*'s second step, and the trial court has ruled on them, completing *Batson*'s third step, the question of whether a defendant initially established a prima facie case of discrimination becomes moot. *State v. Robinson*, 330 N.C. 1, 17, 409 S.E.2d 288, 297 (1991) ("We find it unnecessary to address the trial court's conclusion that defendant failed to make a prima facie case of discrimination because in this case the State voluntarily proffered explanations for each peremptory challenge."); *id.* at 16, 409 S.E.2d at 296–97 (stating that the trial court accepted the State's race-neutral reasons for its peremptory challenges). When the trial court has already ruled that a defendant failed in his ultimate burden of proving purposeful discrimination, there is no reason to consider whether the defendant has met the lesser burden of establishing a prima facie case of discrimination. *See Hernandez v. New York*, 500 U.S. 352, 359, 111 S. Ct. 1859, 1866 (1991) (plurality opinion) ("Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot."); *Waring*, 364 N.C. at 478, 701 S.E.2d at 638 (stating that prima facie case's purpose is to "shift the burden to the State to articulate race-neutral reasons for its peremptory challenge"). This rule is longstanding in our precedents, going back to our 1991 decision in *State v. Thomas*. 329 N.C. 423, 430–31, 407 S.E.2d 141, 147 (1991); *see also State v. Bell*, 359 N.C. 1, 12, 603 S.E.2d 93, 102 (2004); *State v. Williams* (*J. Williams*), 355 N.C. 501, 550–51, 565 S.E.2d 609, 638–39 (2002); *Robinson*, 330 N.C. at 17, 409 S.E.2d at 297.

The Court of Appeals relied on cases stating a different rule, those holding that our review is limited to whether a defendant made a prima facie showing of discrimination where the trial court has ruled on that issue but has not made an ultimate determination of whether the State's proffered reasons are actually race-neutral or pretextual. *See, e.g.*, *State v. Williams* (*J.E. Williams*), 343 N.C. 345, 359, 471 S.E.2d 379, 386–87 (1996) (holding that appellate review is limited to whether the

3. Mr. Hobbs also presented a third issue, whether the trial court and the Court of Appeals erred in their determinations that Mr. Hobbs failed to establish a *prima facie* case of discrimination as to jurors Humphrey and Layden. Because we conclude that the question is moot, we do not address this issue.

trial court erred in finding that a defendant failed to make out a prima facie case of discrimination where the trial court so ruled, allowed the State to give reasons for the record, and did not make findings after the prosecutor gave reasons for the strikes). The Court of Appeals relied on *J.E. Williams* and *State v. Smith*, 351 N.C. 251, 262, 524 S.E.2d 28, 37 (2000), to hold that the question of whether Mr. Hobbs made out a prima facie case was not moot. *Hobbs*, 260 N.C. App. at 404, 817 S.E.2d at 787. Similar to *J.E. Williams*, the trial court in *Smith* had ruled only on whether the defendant in that case had made a prima facie showing of discrimination, not whether the defendant carried the ultimate burden of persuasion. *Smith*, 351 N.C. at 262, 524 S.E.2d at 37. Accordingly, the case is distinguishable from the present case. The facts of this case are governed by the rule as stated by this Court in *Robinson* because the trial court here did consider the prosecution's race-neutral reasons for excusing jurors Humphrey and Layden, ultimately concluding that there was no racial discrimination.

Here, as in *Robinson*, we need not "examine whether defendant met his initial burden." *Robinson*, 330 N.C. at 17, 409 S.E.2d at 297. Neither *J.E. Williams* nor any of the cases relying on it provide a reason to depart from the analysis this Court provided in *Robinson*. Further, this Court has reaffirmed the rule in *Robinson* many times since it was decided. *See, e.g.*, *Bell*, 359 N.C. at 12, 603 S.E.2d at 102; *J. Williams*, 355 N.C. at 550–51, 565 S.E.2d at 638–39; *State v. Smith*, 352 N.C. 531, 540, 532 S.E.2d 773, 780 (2000); *State v. Lemons*, 348 N.C. 335, 361, 501 S.E.2d 309, 325 (1998). Accordingly, consistent with *Robinson*, we reaffirm that the question of whether a defendant has established a prima facie case of discrimination in a *Batson* challenge becomes moot after the State has provided purportedly race-neutral reasons for its peremptory challenges and those reasons are considered by the trial court. *See Robinson*, 330 N.C. at 17, 409 S.E.2d at 297; *see also Miller-El I*, 537 U.S. at 338, 123 S. Ct. at 1040.

In urging the opposite result, the dissent ignores the fact that the trial court ruled on the ultimate question of whether Mr. Hobbs had established a *Batson* violation. Similarly, the dissent ignores our long-standing line of cases holding that, in such a circumstance, the question of whether a defendant has established a *prima facie* case is moot.

In the instant case, the State provided purportedly race-neutral reasons for its use of peremptory challenges to strike jurors Layden and Humphrey. Those reasons were considered by the trial court. As a result, the question of whether Mr. Hobbs established a *prima facie* case of discrimination as to those two jurors is moot.

Purposeful Discrimination

[2] Neither the trial court nor the Court of Appeals appropriately considered all of the evidence necessary to determine whether Mr. Hobbs proved purposeful discrimination with respect to the State's peremptory challenges of jurors Humphrey, Layden, and McNeill. Accordingly, we must remand to the trial court for a new *Batson* hearing.

"A defendant may rely on 'all relevant circumstances' " to support a claim of racial discrimination in jury selection. *Flowers*, 139 S. Ct. at 2245 (quoting *Batson*, 476 U.S. at 96, 106 S. Ct. at 1723); *accord Johnson*, 545 U.S. at 170, 125 S. Ct. at 2417 ("Thus, in describing the burden-shifting framework, we assumed in *Batson* that the trial judge would have the benefit of all relevant circumstances, including the prosecutor's explanation, before deciding whether it was more likely than not that the challenge was improperly motivated."). It follows, then, that when a defendant presents evidence raising an inference of discrimination, a trial court, and a reviewing appellate court, must consider that evidence in determining whether the defendant has proved purposeful discrimination in the State's use of a peremptory challenge.

A criminal defendant may rely on "a variety of evidence to support a claim that a prosecutor's peremptory strikes were made on the basis of race." *Flowers*, 139 S. Ct. 2243. This evidence includes, but is not limited to:

- statistical evidence about the prosecutor's use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case;
- evidence of a prosecutor's disparate questioning and investigation of black and white prospective jurors in the case;
- side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck in the case;
- a prosecutor's misrepresentations of the record when defending the strikes during the *Batson* hearing;
- relevant history of the State's peremptory strikes in past cases; or
- other relevant circumstances that bear upon the issue of racial discrimination.

Id. (citations omitted).

Here, the Court of Appeals did not consider whether Mr. Hobbs met his ultimate burden of persuasion as to potential jurors Humphrey and Layden, instead limiting its review to whether Mr. Hobbs had established a *prima facie* case of discrimination. *Hobbs*, 260 N.C. App. at 404, 817 S.E.2d at 787-88 ("Considering all the relevant factors, we conclude the trial court did not err in finding Defendant had failed to establish a prima facie showing for prospective jurors Layden and Humphrey."). However, the trial court did ultimately rule on the *Batson* challenge as to potential jurors Humphrey and Layden, concluding they were not based on race and describing itself as entering an "order in regards to the full hearing we had with regards to the *Batson* claims and challenges." Because the question of whether there was a prima facie case of discrimination was moot, the Court of Appeals should have reviewed whether the trial court properly applied the law of *Batson* and its progeny in reaching its ultimate conclusion that the prosecution did not use its peremptory challenges to excuse Layden and Humphrey from service on the jury because of their race.

In reaching its decision as to Mr. Hobbs's *Batson* challenge to the State's strikes of Mr. Layden and Mr. Humphrey, the trial court stated that it had "elected to proceed to a full hearing on the defendant's *Batson* claim." The trial court recited facts concerning the race of the victims, the race of the defendant, the race of witnesses, the number of peremptory challenges exercised by the State, and that seventy-five percent of the State's peremptory challenges removed black jurors. The trial court also noted that Mr. Hobbs had used forty percent of his peremptory challenges to remove black jurors. The trial court then recited the reasons given by the State for its decision to excuse jurors Layden and Humphrey, as well as numerous other jurors. As to any comparison of the responses of black and white potential jurors to questioning by the prosecution, the court recited that it "further considered" Mr. Hobbs's arguments in that regard. Following this recitation of facts, the trial court stated that it had concluded "that the State's use of its peremptory challenges were not based on race nor gender, nor has there been a showing that they were based on discrimination of any constitutionally protected class."

There are three legal errors with the trial court's analysis at this point. First, in evaluating a defendant's *Batson* challenge, the peremptory challenges exercised by the defendant are not relevant to the State's motivations. *Miller-El II*, 545 U.S. at 245 n.4, 125 S. Ct. at 2328 n.4 ("[T]he underlying question is not what the defense thought about these jurors" but whether the State was using its peremptory challenges based on race.). The trial court erred by considering the peremptory challenges exercised by Mr. Hobbs.

Second, the trial court did not explain how it weighed the totality of the circumstances surrounding the prosecution's use of peremptory challenges, including the historical evidence that Mr. Hobbs brought to the trial court's attention. The dissent describes this as "a new legal standard" because the historical evidence was not "part of the argument regarding McNeill during the third stage." The trial transcript reveals that in fact, during the argument regarding McNeill, when asked by the trial court whether there was "[a]ny other showing?" counsel for Mr. Hobbs responded: "I believe that we would stand on everything that we've earlier stated." Indeed, there is nothing new about requiring a court to consider all of the evidence before it when determining whether to sustain or overrule a *Batson* challenge. *See*, *e.g.*, *Flowers v. Mississippi*, 139 S. Ct. 2228, 2245 (2019) (requiring consideration of "all relevant circumstances," including "historical evidence of the State's discriminatory peremptory strikes from past trials in the jurisdiction" in deciding a *Batson* claim); *accord Johnson v. California*, 545 U.S. 162, 170, 125 S. Ct. 2410, 2417 (2005). As the *Flowers* Court reminded us, "*Batson* did not preclude defendants from still using the same kinds of historical evidence that *Swain* had allowed defendants to use to support a claim of racial discrimination. Most importantly for present purposes, after *Batson*, the trial judge may still consider historical evidence of the State's discriminatory peremptory strikes from past trials in the jurisdiction, just as *Swain* had allowed." *Flowers*, 139 S. Ct. at 2245 (referencing *Swain v. Alabama*, 380 U. S. 202, 85 S. Ct. 824 (1965)).

Finally, the trial court misapplied *Miller-El II* by focusing only on whether the prosecution asked white and black jurors different questions, rather than also examining the comparisons in the white and black potential jurors' answers that Mr. Hobbs sought to bring to the court's attention. For example, the trial court found that "there's no evidence as to technically racially motivated questions nor does it appear that the method of questioning was done in a discriminatory or racially motivated manner." But Mr. Hobbs argued extensively that every reason given for the State's use of a peremptory challenge against Mr. Layden and Mr. Humphrey was also found among the responses given by white jurors who were passed by the State.

As just one example, experience with mental health professionals was given as a race-neutral reason for excluding Mr. Humphrey; however, white juror Stephens was in group therapy for eight years, while white juror Williams, passed by the State, suffers from anxiety and depression and actually started crying during voir dire. Another white juror passed by the State had a granddaughter who suffered from

bipolar disorder and has been an abuse victim—the juror indicated she had been very much involved in the issue with her granddaughter. We do not know from the trial court's ruling how or whether these comparisons were evaluated. Evidence about similar answers between similarly situated white and nonwhite jurors is relevant to whether the prosecution's stated reasons for exercising a peremptory challenge are mere pretext for racial discrimination. Potential jurors do not need to be identical in every regard for this to be true. *Miller-El II*, 545 U.S. at 247 n.6, 125 S. Ct. at 2329 n.6 ("A *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters.") "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." *Id.* at 241, 125 S. Ct. at 2325. On the ultimate question of whether the State's use of peremptory challenges to exclude jurors Layden and Humphrey was based on race, the trial court misapplied the *Batson* analysis. Thus, we remand for reconsideration of this issue.

[3] Similar legal error occurred in the evaluation by the Court of Appeals and the trial court's evaluation of the *Batson* challenge as to potential juror McNeill, even though by that point the trial court concluded that Mr. Hobbs had established a *prima facie* case of racial discrimination in the prosecution's use of peremptory challenges. The Court of Appeals failed to conduct a comparative juror analysis, despite being presented with the argument by Mr. Hobbs. *Hobbs*, 260 N.C. App. at 407, 817 S.E.2d at 788–89.

The Court of Appeals failed to weigh all the evidence put on by Mr. Hobbs, instead basing its conclusion on the fact that the reasons articulated by the State have, in other cases, been accepted as race-neutral. *See id.* at 407, 817 S.E.2d at 789 ("As with the previous venireman, we conclude the State presented valid, race-neutral reasons for excusing prospective juror McNeill. *See Robinson*, 336 N.C. at 97, 443 S.E.2d at 314 (finding a dismissal of a juror who stated a preference of life imprisonment over the death penalty was 'clear and reasonable'); *see also State v. Maness*, 363 N.C. 261, 272, 677 S.E.2d 796, 804 (2009) (excusing a juror who had mental illness and who had worked with substance abusers, causing the State to fear she would 'overly identify with defense evidence' was valid and race-neutral)."). The trial court similarly failed to either conduct any meaningful comparative juror analysis or to weigh any of the historical evidence of racial discrimination in jury

selection presented by Mr. Hobbs. This failure was erroneous and warrants reversal. *See Flowers*, 139 S. Ct. at 2245; *Johnson*, 545 U.S. at 170, 125 S. Ct. at 2417.

On remand, considering the evidence in its totality, the trial court must consider whether the primary reason given by the State for challenging juror McNeill was pretextual. This determination must be made in light of all the circumstances, including how McNeill's responses during voir dire compare to any similarly situated white juror, the history of the use of peremptory challenges in jury selection in that county, and the fact that, at the time that the State challenged juror McNeill, the State had used eight of its eleven peremptory challenges against black potential jurors. At the same point in time, the State had used two of its peremptory challenges against white potential jurors. Similarly, the State had passed twenty out of twenty-two white potential jurors while passing only eight out of sixteen black potential jurors.

Failing to apply the correct legal standard, neither the trial court nor the Court of Appeals adequately considered all of the evidence offered by Mr. Hobbs to support his claim that certain potential jurors were excused from serving on the jury in his case on the basis of their race. Accordingly, the trial court must conduct a new hearing on these claims.

Conclusion

The Court of Appeals erred in holding that the question of whether Mr. Hobbs had established a prima facie case was not moot. Further, the Court of Appeals erred as a matter of law and the trial court clearly erred in ruling that Mr. Hobbs failed to prove purposeful discrimination with respect to the State's use of peremptory challenges to strike jurors Humphrey, Layden, and McNeill without considering all of the evidence presented by Mr. Hobbs. This error included failing to engage in a comparative juror analysis of the prospective juror's voir dire responses and failing to consider the historical evidence of discrimination that Mr. Hobbs raised. We remand for further proceedings in the trial court not inconsistent with this opinion. The trial court is instructed to conduct a *Batson* hearing consistent with this opinion, to make findings of fact and conclusions of law, and to certify its order to this Court within sixty days of the filing date of this opinion, or within such time as the current state of emergency allows. *See Hoffman*, 348 N.C. at 555, 500 S.E.2d at 723.

REVERSED AND REMANDED.

Justice NEWBY dissenting.

In this case the Court should apply our well-established deferential standard of review that allows the trial court to assess the prosecutor's demeanor and credibility and other circumstances of jury selection. Here defense counsel made several *Batson* challenges when the State exercised peremptory challenges to excuse black prospective jurors. After receiving extensive argument from the parties on the three jurors at issue here and conducting the proper analysis, the trial court concluded that defendant had not met his burden of presenting a prima facie showing of discrimination for two prospective jurors, nor had defendant met his burden to prove purposeful discrimination for a third prospective juror.

While the majority rotely recites the proper standard of review, which is highly deferential to the trial court, it then circumvents that standard by finding what it labels to be "legal errors" in the trial court's determination, thus warranting a new *Batson* hearing. The majority makes arguments not presented to the trial court or the Court of Appeals and then faults both courts for not specifically addressing them. It finds and weighs facts from a cold record. The trial court has already conducted the correct inquiry. Because the trial court's ruling, concluding that defendant neither made a prima facie showing of discrimination nor ultimately met his burden of proving purposeful discrimination, is not clearly erroneous, it should be upheld. I respectfully dissent.

I. Facts and Procedural History

Defendant[1] concedes that he killed two people, one black and one white, and that he committed an armed robbery. On 5 November 2010 in Georgia, defendant executed Rondriako Burnett in cold blood. Burnett's body was later identified, and officers recovered a .380 caliber bullet from his body.

On 6 November 2010, defendant and his girlfriend Alexis Mattocks sat in Burnett's bloodstained, stolen SUV in the parking lot of a pawn shop in Fayetteville, North Carolina. The SUV had broken down. Defendant entered the shop to try to pawn a CD player. The pawn shop employee would not purchase the CD player because it was broken. Defendant walked outside, but later reentered the shop, asked to sell car speakers, and told Kyle Harris, a nineteen-year-old college student and employee at the pawn shop, that defendant needed help since the SUV was broken

1. In following this Court's 200 years of precedent, this opinion uses the term "defendant." The majority deviates from this Court's precedent by using defendant's name.

down. Harris agreed to purchase the speakers and paid defendant $50. Defendant left the pawn shop, but he and Mattocks remained at the shopping center all day with the apparent intent to later rob the store. In furtherance of this plot, they bought duct tape which they planned to use to bind the victims.

Later that evening, defendant and Mattocks entered the pawn shop to commit an armed robbery. After browsing the shop, defendant pulled out a .380 caliber handgun and pointed it at the pawn shop employees. Defendant told the employees to empty their pockets and demanded that they hand over their valuables and empty the cash register. In abiding with defendant's direction, Harris began walking toward the cash register, at which time defendant shot Harris in the upper chest.

Defendant had also directed another employee, Derrick Blackwell, to empty the register, and had told a third employee, Sean Collins, to empty his pockets. Once Collins complied, defendant took Collins' belongings, grabbed the dying Harris's car keys from his belt loop, and exited the store. Defendant moved items from the stolen SUV to Harris's car, a silver Saturn Ion. Defendant and Mattocks then left in the Saturn. When first responders arrived on the scene, Harris was unresponsive. He later died from the gunshot wound.

On 6 November 2010, in Washington, D.C., a police officer observed a car with a North Carolina tag, learned that the vehicle was stolen, and began to pursue the vehicle. The officer conducted a traffic stop and arrested defendant. Officers thereafter learned that defendant was a "person of interest" in connection with a robbery and homicide in Fayetteville, North Carolina. After verifying that defendant was the person of interest and seeing blood on defendant's shoes and pant leg, officers obtained a search warrant for the Saturn. During the search, officers recovered a .380-caliber Lorcin handgun, which was later confirmed to match the bullets found in both Burnett's and Harris's bodies.

After obtaining the proper warrants, a detective from North Carolina traveled to Washington, D.C. to interview defendant. During the interview, defendant admitted to the robbery and said he was trying to get "[m]oney and guns." He said he had fired his weapon to "scare" the pawn shop employees but that he "wasn't trying to shoot [Harris]." Defendant was later indicted for, *inter alia*, first-degree murder, two counts of robbery with a dangerous weapon, two counts of attempted robbery with a dangerous weapon, and one count of conspiracy to commit robbery with a dangerous weapon. The State gave notice that it intended to proceed capitally. Defendant gave notice that he would assert mental infirmity, diminished capacity, and automatism defenses.

At trial there was no dispute that defendant killed Harris and committed the armed robbery since he confessed to committing both offenses. The only question at trial was defendant's culpability and his sentencing, *i.e.*, whether defendant's actions warranted capital punishment.

At defendant's trial, as is the case in all North Carolina criminal proceedings involving potential capital punishment, the State and defendant were each given fourteen peremptory challenges. *See* N.C.G.S. § 15A-1217(a) (2019). Because defendant was being tried capitally, each prospective juror had to be capitally qualified, meaning the juror would be willing to impose the death penalty if the evidence warranted such punishment. As such, proper procedure required the State to examine the prospective jurors to elicit, in part, whether they "[a]s a matter of conscience, regardless of the facts and circumstances, would be unable to render a verdict with respect to the charge." N.C.G.S. § 15A-1212(8) (2019). If prospective jurors testified that they would not be able to impose the death penalty, they could be removed for cause. The State and defendant could exercise a peremptory challenge for any other reason, so long as the challenge was not used for a discriminatory purpose.

During jury selection, the State exercised two peremptory challenges to excuse black prospective jurors Robert Layden and Brian Humphrey. Defense counsel then objected on *Batson* grounds. At the time defense counsel raised the *Batson* objection, the State had peremptorily challenged eight prospective jurors, six of whom were black, but had passed five black prospective jurors to defendant, equaling a 45% acceptance rate of the black prospective jurors it had questioned. Defense counsel had peremptorily challenged three white prospective jurors and two black prospective jurors, meaning it had used 40% of its peremptory challenges to strike black prospective jurors. Thus, defendant reduced the number of black prospective jurors serving on the jury.

After defense counsel raised the *Batson* objection, at defendant's request, the trial court agreed to delay argument on the *Batson* challenge until the following day. The trial court advised the parties, however, that it was inclined, "even if [it found] there's no prima facie showing[,] . . . to hear an explanation just for appellate purposes from the State."

The next morning, when presenting its argument supporting its *Batson* challenge, defense counsel stated that there had been a history of discrimination in the county, that defendant was black but the victim and most of the witnesses were white, that the challenged black prospective jurors gave answers similar to those given by the white prospective jurors that the State passed to defendant, that six of

the eight peremptory challenges exercised by the State were exercised against black prospective jurors, and that the State had disproportionately struck black prospective jurors when compared to white prospective jurors.

The trial court then stated, consistent with its statement the day before, that it would give the State the opportunity to respond, not for "mutual justification or [its rebuttal]," but just to establish why defendant had "not made a prima facie case just as to those issues." Among other reasons, the State noted that defense counsel had failed to object to any of the black prospective jurors before Humphrey and Layden, who were the seventh and eighth prospective jurors challenged. The State also noted that there was both a white and a black victim in the case as well as key black witnesses.[2]

After evaluating the evidence, the trial court ruled that defendant had not made a prima facie showing of discrimination. The trial court then stated the following: "However, I want the State—for purpose[s] of the record, I will hear the State and ask the State now to show any neutral justifications for the excuse of the exercise and peremptory challenges against the African American jurors." The State then gave the following reasons for excusing Layden: (1) his sister, with whom he was very close, had significant mental health issues, including post-traumatic stress disorder (PTSD), and had experienced symptoms very similar to those claimed by defendant in his defense; (2) his reservations about the death penalty combined with his position on being a father figure to others; (3) his testimony that he favored giving people a second chance or chance for reform; (4) his statement that he was going to have to put his personal feelings aside; (5) his testimony about having reservations about the death penalty though he ultimately said he would be able to impose it; (6) his statement that he did not want to go into detail about his prior breaking or entering conviction; and (7) the fact that he did not provide information about another previous criminal charge against him. The State then gave the following reasons for excusing Humphrey: (1) he had connections and employment in the mental health field; (2) he had interacted with and had a positive opinion of mental health professionals, which the State found especially concerning since defendant planned to rely heavily on the testimony of mental health providers; (3) he had worked at a facility serving and mentoring individuals in a group

2. Burnett was not the victim at issue here because he was killed in Georgia. The State, however, introduced evidence of his death for the limited, permissible purposes of showing motive, intent, and "other purposes," such as chain of circumstances as allowed by N.C.G.S. § 8C-1, Rule 404(b) (2019).

home and a halfway house, which made the State believe he would identify with defendant's life history; and (4) he had expressed a hesitancy to impose the death penalty since "he is not a killer" and said he would have sympathy for defendant.

After this challenge, the trial court ultimately reiterated its finding that defendant had not made a prima facie showing of discrimination. Regardless, after having conducted a full *Batson* hearing for the potential appellate record, the trial court concluded that the State did not use any of its peremptory challenges based on a juror's race or any discrimination against any constitutionally protected class.

Jury selection continued, and defendant later raised another *Batson* objection when the State peremptorily challenged William McNeill, another black prospective juror. At that point, the State had peremptorily challenged eight black prospective jurors and passed eight black prospective jurors to defendant, having used a total of eleven of its statutory fourteen peremptory challenges. The trial court found that when McNeill was challenged, defendant had made a prima facie showing of discrimination. The State then gave the following reasons for excusing McNeill: (1) his reservations about the death penalty; (2) the fact that he hesitated, raised his hand during questioning, and did not know how to answer the trial court's questions about imposing the death penalty; (3) his response that he was not for the death penalty though he ultimately said he could consider it; (4) his overall preference for life imprisonment without parole, which was not strong enough to justify a challenge for cause, but could warrant a peremptory challenge in the State's opinion; (5) the fact that he had family members with substance abuse and anxiety issues; and (6) the fact that he was a pastor that participated in outreach to those going through difficult issues. In addition, the State compared McNeill to Rosas, a Hispanic prospective juror it had also peremptorily excused, who expressed similar hesitation about imposing the death penalty. Defendant countered that Rosas and McNeill did not give similar answers when asked about their opinion on the death penalty, but defendant cited no other prospective jurors the State had passed to argue that the State's reasons for excusing McNeill were pretextual.

After considering all of the evidence, including how many black prospective jurors the State had peremptorily excused versus how many it had passed to defendant, the trial court concluded that the State gave permissible, race-neutral reasons for exercising its peremptory challenge against McNeill. The trial court found persuasive that the State had also peremptorily challenged Rosas, who gave similar answers as McNeill. Thus, after concluding that defendant's constitutional rights

had not been violated, the trial court ultimately denied defendant's *Batson* challenge.

The case proceeded to trial. Defendant did not testify, but various mental health experts and family members testified on his behalf. Consistent with the defenses that defendant noted he would raise, witnesses testified that defendant had a troubled childhood, was surrounded by violence and substance abuse, that his mother had abused him, and that he eventually began using drugs. The mental health experts also testified that defendant had various personality disorders and PTSD. The mental health experts testified that defendant had told them that he was mad at Burnett and therefore wanted to kill him and that he was not remorseful for doing so. On the other hand, defendant stated that he did not intend to kill Harris.

The jury convicted defendant of all charges. As for the first-degree murder charge, the jury found defendant guilty based on theories of malice, premeditation, and deliberation, as well as under the felony murder rule based on defendant committing two counts of robbery with a dangerous weapon and two counts of attempted robbery with a dangerous weapon. Despite these findings, the jury could not unanimously agree to impose the death penalty. Defendant was sentenced to life imprisonment without parole for the first-degree murder conviction, consolidated with one attempted robbery with a dangerous weapon conviction, followed by consecutive sentences for each of the remaining convictions.

On appeal to the Court of Appeals, defendant argued, *inter alia*, that the trial court erred in concluding that defendant had not met his burden to establish a prima facie case of discrimination when the State peremptorily excused Layden and Humphrey and in concluding that defendant had not established purposeful discrimination in challenging Layden, Humphrey, and McNeill. The Court of Appeals disagreed, holding that the trial court did not err in rejecting each of defendant's *Batson* challenges. *State v. Hobbs*, 260 N.C. App. 394, 409, 817 S.E.2d 779, 790 (2018).

The Court of Appeals began by recognizing the historic, deferential standard of review in matters involving *Batson* challenges. *Id.* at 401–02, 817 S.E.2d at 785. Applying precedent from the Supreme Court of the United States and this Court, the Court of Appeals recognized that the applicable standard of review required deference to the trial court's findings; thus, the trial court's decision on a *Batson* challenge should be upheld unless an appellate court is convinced the trial court's decision is clearly erroneous. *Id.* at 401, 817 S.E.2d at 785. The Court of Appeals reiterated this Court's well-established principle that, "[w]here there are

two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." *Id.* at 401, 817 S.E.2d at 785 (quoting *State v. Lawrence*, 352 N.C. 1, 14, 530 S.E.2d 807, 816 (2000), *cert. denied*, 531 U.S. 1083, 121 S. Ct. 789 (2001)).

Employing the well-settled standard of review, the Court of Appeals evaluated defendant's argument about the trial court's decision on the first two prospective jurors, Layden and Humphrey. *Hobbs*, 260 N.C. App. at 404, 817 S.E.2d at 787. It concluded that the question of whether defendant had established a prima facie case of purposeful discrimination was not moot as the trial court had merely asked for the State's reasoning to put on the record in case of appeal. *Id.* The Court of Appeals then concluded that, looking at all of the relevant circumstances, the trial court did not err in deciding that defendant had not established a prima facie showing of discrimination regarding prospective jurors Layden and Humphrey. *Id.* at 405, 817 S.E.2d at 787. Considering McNeill, the Court of Appeals noted the trial court's articulated reasons for concluding that the State had provided valid, race-neutral reasons for excusing McNeill and that defendant had failed to prove any purposeful discrimination by the State. *Id.* at 407, 817 S.E.2d at 788–89. Thus, applying the appropriate deferential standard of review, the Court of Appeals upheld the trial court's decision on all grounds. *Id.* at 408–09, 817 S.E.2d at 789–90.

II. Analysis

The essence of a *Batson* challenge is to reveal discriminatory intent by the State in excusing a prospective juror. Thus, *Batson* challenges involve credibility determinations, *i.e.*, evaluating the State's motives in exercising peremptory challenges. Given that a *Batson* challenge alleges intentional discrimination, the trial court must determine whether the State intentionally removed a prospective juror because of race. An appellate court must rely on the trial court's objective assessment of the State's motives and other circumstances. *See Flowers v. Mississippi*, 139 S. Ct. 2228, 2244 (2019) ("[T]he trial [court's] findings in the [*Batson*] context . . . largely will turn on evaluation of credibility." (quoting *Batson v. Kentucky*, 476 U.S. 79, 98 n.21, 106 S. Ct 1712, 1715 n.21 (1986))); *see also id.* at 2243 (stating that "the job of enforcing *Batson* rests first and foremost with trial judges" (citing *Batson*, 476 U.S. at 99 n.22, 106 S. Ct. at 1724 n.22)); *State v. Barnes*, 345 N.C. 184, 212, 481 S.E.2d 44, 59 (1997) ("It also bears repeating that jury selection is 'more art than science' and that only in the rare case 'will a single factor control the decision-making process,' as well as that a prosecutor may rely on legitimate hunches in the exercise of peremptory challenges." (first quoting *State v. Porter*, 326 N.C. 489, 501, 391 S.E.2d 144, 152 (1990); and then citing *State v. Rouse*,

339 N.C. 59, 79, 451 S.E.2d 543, 554 (1994))). Notably, "[t]rial judges, who are 'experienced in supervising voir dire,' and who observe the prosecutor's questions, statements, and demeanor firsthand, are well qualified to 'decide if the circumstances concerning the prosecutor's use of peremptory challenges create[ ] a prima facie case of discrimination against black jurors.' " *State v. Chapman*, 359 N.C. 328, 339, 611 S.E.2d 794, 806 (2005) (alteration in original) (quoting *Batson*, 476 U.S. at 97, 106 S. Ct. at 1723).

Because this determination involves assessing credibility, the standard of review for *Batson* challenges is well-established. A trial court's factual findings on a *Batson* determination must be upheld unless they are clearly erroneous. *Flowers*, 139 S. Ct. at 2244 ("On appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous." (quoting *Snyder v. Louisiana*, 552 U.S. 472, 477, 128 S. Ct. 1203, 1207–08 (2008))); *State v. Taylor*, 362 N.C. 514, 527–28, 669 S.E.2d 239, 254 (2008) (stating that a trial court's findings on whether defendant has made a prima facie showing of discrimination will be upheld "unless they are clearly erroneous"); *State v. Golphin*, 352 N.C. 364, 427, 533 S.E.2d 168, 211 (2000) (recognizing that a trial court's determination on the third prong of *Batson*—whether defendant has met his burden to show that the State purposefully discriminated in exercising peremptory challenges—should be upheld "unless we are convinced it is clearly erroneous" (citing *State v. Kandies*, 342 N.C. 419, 434–35, 467 S.E.2d 67, 75, *cert. denied*, 519 U.S. 894, 117 S. Ct. 237 (1996))).

While reciting the correct deferential standard of review, the majority fails to apply it. The majority circumvents the deferential standard of review by characterizing its criticism of the trial court as "legal errors." In doing so, it devalues the significant institutional advantages of the trial court including the ability to have face-to-face interaction with the parties, to observe an individual's demeanor, and to make credibility determinations based on the parties' non-verbal communication cues accompanying its arguments. Given these advantages, the trial court is best suited to assess the use of each peremptory challenge. This is particularly true in that we have recognized that jury selection "is 'more art than science' and that . . . a prosecutor may rely on legitimate hunches in the exercise of peremptory challenges." *Barnes*, 345 N.C. at 212, 481 S.E.2d at 59. It appears that the majority is again placing itself in the role of fact-finder, usurping the role of the trial court. *See State v. Reed*, 838 S.E.2d 414, 429 (N.C. 2020) (Newby, J., dissenting) ("An appellate court must determine whether the trial court's findings of fact are supported by competent evidence and whether those findings support the

trial court's conclusions of law. Instead, on a cold record the majority reweighs the evidence and makes its own credibility determinations in finding facts." (citing *State v. Williams*, 366 N.C. 110, 114, 726 S.E.2d 161, 165 (2012))); *State v. Terrell*, 372 N.C. 657, 674, 831 S.E.2d 17, 28 (2019) (Newby, J., dissenting) ("In addition, to reach its result, the majority violates the standard of review by rejecting facts found by the trial court, which are supported by substantial evidence, and substitutes its own fact-finding."); *State v. Grady*, 372 N.C. 509, 552, 831 S.E.2d 542, 573 (2019) (Newby, J., dissenting) ("[The majority] rejects the facts found by the trial court and finds its own.").

There are two types of challenges that attorneys may use to challenge or excuse certain prospective jurors. *Flowers*, 139 S. Ct. at 2238. First, an attorney may exercise a for-cause challenge, "which usually stems from a potential juror's conflicts of interest or inability to be impartial." *Id.* In North Carolina, a prospective juror may be challenged for cause for, *inter alia*, being "unable to render a verdict with respect to the charge in accordance with" North Carolina law. N.C.G.S. § 15A-1212(8) (2019).

The second type of challenge that attorneys may exercise is a peremptory challenge. Though not a constitutionally recognized principle, "[p]eremptory strikes have very old credentials and can be traced back to the common law." *Flowers*, 139 S. Ct. at 2238. "[P]eremptory strikes traditionally may be used to remove any potential juror for any reason—no questions asked." *Id.*

The Equal Protection Clause prevents discrimination, however, and thus can conflict with an attorney's ability to exercise peremptory challenges for any reason. *Id.* Accordingly, the Supreme Court of the United States recognized limitations on peremptory challenges to ensure that strikes are not used for a discriminatory purpose against a protected class. Thus, in *Batson*, the Supreme Court of the United States set forth a three-prong test to determine whether a prosecutor improperly dismissed a prospective juror based on that juror's race. This Court expressly "adopted the *Batson* test for review of peremptory challenges under the North Carolina Constitution." *State v. Fair*, 354 N.C. 131, 140, 557 S.E.2d 500, 509 (2001) (citing *Lawrence*, 352 N.C. at 13, 530 S.E.2d at 815; *State v. Mitchell*, 321 N.C. 650, 365 S.E.2d 554 (1988)); *see* N.C. Const. art. I, § 26.

"First, the defendant must make a prima facie showing that the state exercised a peremptory challenge on the basis of race." *Fair*, 354 N.C. at 140, 557 S.E.2d at 509. "[A] defendant satisfies the requirements of

Batson's first step by producing evidence sufficient to permit the trial [court] to draw an inference that discrimination has occurred." *Johnson v. California*, 545 U.S. 162, 170, 125 S. Ct. 2410, 2417 (2005). Nonetheless, this step is important in minimizing disruption in the jury selection process, limiting the number of trials within trials that occur within *Batson* hearings. *See generally id.* at 172–73, 125 S. Ct. at 2418–19 (noting that the *Batson* framework "encourages 'prompt rulings on objections to peremptory challenges without substantial disruption to the jury selection process' " (quoting *Hernandez v. New York*, 500 U.S. 352, 358–59, 111 S. Ct. 1859, 1865–66 (1991) (plurality opinion))). Several factors are relevant in informing the trial court as to whether the defendant has carried his burden to show an inference of discrimination:

> Those factors include the defendant's race, the victim's race, the race of the key witnesses, questions and statements of the prosecutor which tend to support or refute an inference of discrimination, repeated use of peremptory challenges against blacks such that it tends to establish a pattern of strikes against blacks in the venire, the prosecution's use of a disproportionate number of peremptory challenges to strike black jurors in a single case, and the State's acceptance rate of potential black jurors.

State v. Quick, 341 N.C. 141, 145, 462 S.E.2d 186, 189 (1995).

"Once a defendant has made a prima facie case, the burden of production shifts to the prosecutor to come forward with race-neutral explanations for the peremptory challenges." *Id.* at 144, 462 S.E.2d at 188. "[T]he 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes." *Johnson*, 545 U.S. at 168, 125 S. Ct. at 2416 (quoting *Batson*, 476 U.S. at 94, 106 S. Ct. at 1721). Notably, "the law 'does not demand [a race-neutral] explanation that is persuasive, or even plausible. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.' " *Quick*, 341 N.C. at 144–45, 462 S.E.2d at 188 (alteration in original) (quoting *Purkett v. Elem*, 514 U.S. 765, 767–68, 115 S. Ct. 1769, 1770–71 (1995)). "[T]he prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause." *Batson*, 476 U.S. at 97, 106 S. Ct. at 1723 (citing *McCray v. Abrams*, 750 F.2d 1113, 1132 (2d Cir. 1984), *cert. granted*, *judgment vacated by Abrams v. McCray*, 478 U.S. 1001, 106 S. Ct. 3289 (1986); *Booker v. Jabe*, 775 F.2d 762, 773 (6th Cir. 1985), *cert. granted*, *judgment vacated by Michigan v. Booker*, 478 U.S. 1001, 106 S. Ct. 3289 (1986)).

> The first two *Batson* steps govern the production of evidence that allows the trial court to determine the persuasiveness of the defendant's constitutional claim. 'It is not until the *third* step that the persuasiveness of the justification becomes relevant—the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination.'

Johnson, 545 U.S. at 171, 125 S. Ct. at 2418 (quoting *Purkett*, 514 U.S. at 768, 115 S. Ct. at 1771). Thus, " '[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination." *Purkett*, 514 U.S. at 767, 115 S. Ct. at 1770–71 (citing *Hernandez*, 500 U.S. at 358–59, 111 S. Ct. at 1865–66; *id.* at 375, 111 S. Ct. at 1874 (O'Connor, J., concurring in judgment); *Batson*, 476 U.S. at 96–98, 106 S. Ct. at 1722–23). "The ultimate inquiry is whether the State was 'motivated in substantial part by discriminatory intent.' " *Flowers*, 139 S. Ct. at 2244 (quoting *Foster v. Chatman*, 136 S. Ct. 1737, 1754 (1996)). Thus, "[s]tep three of the *Batson* inquiry involves an evaluation of the prosecutor's credibility, and 'the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge.' " *Snyder*, 552 U.S. at 477, 128 S. Ct. at 1208 (second alteration in original) (first citing *Batson*, 476 U.S. at 98 n.21, 106 S. Ct. at 1724 n.21; and then quoting *Hernandez*, 500 U.S. at 365, 111 S. Ct. at 1869).

a. Mootness

Here defendant argues, and the majority agrees, that the question of whether defendant established a prima facie case of discrimination became moot when, at the trial court's request, the State offered its reasoning for challenging Layden and Humphrey.

"Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." *Hernandez*, 500 U.S. at 359, 111 S. Ct. at 1869. "If the prosecutor volunteers his reasons for the peremptory challenges in question before the trial court rules whether the defendant has made a prima facie showing or if the trial court requires the prosecutor to give his reasons without ruling on the question of a prima facie showing, the question of whether the defendant has made a prima facie showing becomes moot." *State v. Williams*, 343 N.C. 345, 359, 471 S.E.2d 379, 386 (1996) (citing *Hernandez*, 500 U.S. at 359, 111. S. Ct. at 1866; *State v. Robinson*, 336 N.C. 78, 93, 443 S.E.2d

306, 312 (1994), *superseded by statute on other grounds as stated in Cummings v. Ortega*, 365 N.C. 262, 716 S.E.2d 235 (2011)).

When a trial court asks for the State's reasoning for using peremptory challenges *after* making a ruling that the defendant has not met his initial burden of showing an inference of prima facie discrimination, however, the question of whether the defendant has made a prima facie showing is not moot. *See id.* If the trial court asks for the State's reasons after a defendant requests them to be stated for the record, for example, the first step of the *Batson* inquiry is not moot. *See id.*; *see also State v. Smith*, 351 N.C. 251, 262, 524 S.E.2d 28, 37 (2000) ("In the instant case, the trial court concluded that defendant had not made a prima facie showing that the peremptory challenge was exercised on the basis of race, but the trial court permitted the State to make any comments for the record that it chose to make. When the trial court rules that a defendant has failed to make a prima facie showing, our review is limited to whether the trial court erred in finding that defendant failed to make a prima facie showing even if the State offers reasons for its exercise of the peremptory challenges." (citing *State v. Hoffman*, 348 N.C. 548, 554, 500 S.E.2d 718, 722–23 (1998))).

Here the trial court explicitly stated that it was inclined, "even if [it found] there's no prima facie showing on any case[,] . . . to hear an explanation just for appellate purposes from the State." Thus, even though the trial court asked for and the State presented reasons why defendant had not made a prima facie case, the trial court made clear that it was only for the purpose of preserving the record and not for consideration for its decision. Moreover, the trial court asked for the State's reasons justifying its use of the peremptory challenges only after the trial court had ruled that defendant had not made a prima facie showing of discrimination. Because the trial court explicitly stated that it was asking for the State's reasoning solely for the purpose of preserving the record, the question of whether defendant presented a prima facie case is not moot. *See Williams*, 343 N.C. at 359, 471 S.E.2d at 386. The trial court appropriately recognized that its *Batson* ruling would be subject to appellate review given the serious charges and resulting lengthy trial, and therefore attempted to provide a complete record. The majority's holding will eliminate this practice.

b. Humphrey and Layden

Since the first step prima facie question is not moot, and recognizing the extremely deferential standard of review, it cannot be said that the trial court clearly erred in determining that defendant did not establish

a prima facie case of discrimination. Among other things, the trial court considered the State's demeanor when responding to defense counsel, the questions that the State asked the black prospective jurors, and that the State had passed five of the black prospective jurors that were not excused for cause. *See Quick*, 341 N.C. at 145, 462 S.E.2d at 189. Because the trial court considered the correct factors and reached a reasoned, factually supported conclusion, and given the deference afforded to the trial court, the trial court's decision here cannot be deemed clearly erroneous.

Nonetheless, even if the trial court should have proceeded to the second and third *Batson* stages, the trial court did not clearly err in determining for the record that the State offered permissible, race-neutral reasons for exercising peremptory challenges to excuse Layden and Humphrey. After hearing extensive argument, the trial court made comprehensive findings in which it considered the race of defendant, the victim, and the witnesses. The trial court evaluated the way the State questioned the black prospective jurors versus the way it questioned white prospective jurors, concluding that the State had not questioned any jurors in a discriminatory manner. The trial court recounted the relevant statistics, noting that the State had passed 45% of black prospective jurors and that the State had struck two white prospective jurors. The trial court recounted and found convincing the State's reasons for excusing Layden and Humphrey, including their mental health history, connections, equivocation on the death penalty, and other life history. Those factors directly related to the defense that defendant planned to assert at trial as well as to the potential capital punishment at issue. The trial court also considered the prospective jurors that the State had passed to defendant versus those it had peremptorily excused. Thus, the trial court's decision that the prosecutor had acted with discriminatory intent in removing Layden and Humphrey was supported by the evidence and the testimony and cannot be deemed clearly erroneous.

c. McNeill

With the challenge to McNeill, the trial court found that defendant had presented a prima facie case of discrimination. The trial court then conducted a full *Batson* hearing. At the third stage, the trial court considered all of the evidence presented and arguments made, and ultimately determined defendant had not proven that the State purposefully discriminated in peremptorily challenging McNeill. The burden of proof was on defendant to prove discriminatory intent. In making its decision, the trial court made the following findings: (1) the State had exercised eight of its peremptory challenges to excuse black prospective jurors and passed the same number of black prospective

jurors to defendant; (2) when asked whether he could impose the death penalty, McNeill had equivocated on his responses and expressed a general preference for a sentence of life imprisonment without parole; (3) McNeill had family members with anxiety issues; (4) that in his position as a pastor, McNeill dealt with individuals who had drug problems; and (5) when compared with Rosas, who the State also excused, both McNeill and Rosas expressed hesitancy about imposing the death penalty. Significantly, the only specific prospective juror comparison that defendant argued to the trial court was that of McNeill to Rosas.

These race-neutral reasons found by the trial court have a direct bearing on the issues presented in this case and McNeill's duties as a prospective juror. While McNeill's equivocation about the death penalty may not have risen to a level sufficient for the State to challenge him for cause, McNeill's reservations on the death penalty relate to an essential part of the case. Moreover, given defendant's extensive mental health and substance abuse concerns presented in detail at trial, certainly the trial court did not clearly err by determining that these types of connections, especially that McNeill worked directly with individuals with similar concerns as defendant, fairly informed the State's decision to exercise a peremptory challenge. Thus, the trial court appropriately considered the evidence and arguments presented to it and held that the State did not intentionally discriminate in exercising a peremptory challenge to remove McNeill from the jury. Applying the correct standard of review, the trial court's decision to reject defendant's *Batson* challenge of McNeill was not clearly erroneous.

In order to justify its remand, the majority recites what it characterizes as "three legal errors" committed by the trial court. First, it holds that "in evaluating the defendant's *Batson* challenge, the number of peremptory challenges exercised by the defendant are not relevant to the State's motivations." That is not true. When considering the totality of the circumstances, the ultimate racial composition of the jury is directly impacted by the defendant's exercise of peremptory challenges to excuse minority prospective jurors.

Second, the majority says the trial court erred because it "did not explain how it weighed the totality of the circumstances surrounding the prosecutor's use of peremptory challenges, including the historical evidence that [defendant] brought to the trial court's attention." However, the trial court thoroughly evaluated all of the evidence presented and each of defendant's arguments and set forth its reasons in finding that there was no racial discrimination by the State. Notably, the historical evidence was argued by defendant at the prima facie showing phase

regarding the first two jurors. It was not part of the argument regarding McNeill during the third stage. The majority creates a new legal standard by requiring the trial court to explain how it weighed an argument that was not presented.

Third, the majority holds "the trial court misapplied *Miller-El II* by focusing only on whether the prosecution asked white and black jurors different questions, rather than also examining the comparisons in the white and black potential jurors' answers that [defendant] sought to bring to the court's attention." With this holding, the majority finds that the trial court and the Court of Appeals erred by not addressing arguments that defendant failed to present to them. The comparison to Stephens presented by the majority was not presented to the trial court or the Court of Appeals. The majority says that the Court of Appeals "failed to conduct a comparative juror analysis, despite being presented with the argument by" defendant. Notably, the entirety of defendant's comparative juror analysis at the Court of Appeals was as follows: the "circumstances the State said were reasons for striking African-American jurors also fit white jurors the State accepted as jurors." Defendant carries the burden of making arguments to the trial court and the appellate courts, and he advanced no argument about any specific comparative juror analysis to the either court. It is not the role of the appellate court to peruse the trial transcript and formulate new arguments for defendant that he did not make at trial or on appeal. The majority cannot realistically say that the trial court or the Court of Appeals should have addressed factually specific arguments that defendant himself did not make.

Importantly, the standard of review for reviewing *Batson* challenges is whether the trial court's decision was clearly erroneous. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Lawrence*, 352 N.C. at 14, 530 S.E.2d at 816 (quoting *State v. Thomas*, 329 N.C. 423, 433, 407 S.E.2d 141, 148 (1991)). This Court is not a trial court. It should not make factual determinations based on a cold record. Furthermore, it should not create arguments not presented to the trial court or the Court of Appeals. The trial court did not clearly err by determining that defendant had not shown that the State purposefully discriminated in exercising its peremptory challenges. As such, the trial court's determination as to those prospective jurors should be upheld. Therefore, I respectfully dissent.

STATE OF NORTH CAROLINA
v.
PATRICK MYLETT

No. 6A19

Filed 1 May 2020

Conspiracy—to commit juror harassment—agreement—sufficiency of evidence

Defendant's conviction of conspiracy to harass jurors was reversed where the State presented insufficient evidence of an agreement to threaten or intimidate jurors following the conviction of defendant's brother for assault. Although defendant, his brother, and his brother's girlfriend all interacted with multiple jurors in the hallway outside of the courtroom, most of defendant's contact with the jurors occurred in a relatively brief amount of time when defendant was alone, and there was almost no evidence that defendant's group communicated with each other or that they synchronized their behavior to support an inference, beyond mere suspicion, that they had reached a mutual understanding to harass the jurors.

Justice ERVIN dissenting.

Justices NEWBY and DAVIS join in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 822 S.E.2d 518 (N.C. Ct. App. 2018), finding no error after appeal from a judgment entered on 2 February 2017 by Judge Marvin P. Pope, Jr. in Superior Court, Watauga County. Heard in the Supreme Court on 8 January 2020.

Joshua H. Stein, Attorney General, by Ryan Y. Park, Deputy Solicitor General, for the State-appellee.

Goodman Carr, PLLC, by W. Rob Heroy, for defendant-appellant.

Tin Fulton Walker & Owen, PLLC, by Noell P. Tin; and Scott & Cyan Banister First Amendment Clinic, UCLA School of Law, by Eugene Volokh, for Pennsylvania Center for the First Amendment, amicus curiae.

EARLS, Justice.

STATE v. MYLETT

[374 N.C. 376 (2020)]

Defendant, Patrick Mylett, attended the trial of his twin brother who was found guilty of assault on a government official by a jury in Superior Court, Watauga County, on 31 March 2016. Approximately eleven months later, defendant was convicted of conspiracy to commit harassment of a juror in the same county because of his actions at the Watauga County Courthouse following his brother's conviction. Because the evidence in defendant's trial was insufficient to raise anything more than mere conjecture that he had made an agreement with another person to threaten or intimidate a juror, it was error for the trial court to deny his motion to dismiss.

Background

On 29 August 2015, defendant and his twin brother, Dan, were involved in an altercation at a fraternity party in Boone, North Carolina, during which Dan was severely beaten, requiring hospitalization. Dan was subsequently charged with assault on a government official for allegedly spitting on a law enforcement officer during the incident. At the end of the trial, at which defendant testified on Dan's behalf, the jury found Dan guilty of the offense on 31 March 2016. After Dan's sentencing, defendant exited the courtroom and was waiting in the lobby of the courthouse as jurors began exiting the courtroom and retrieving their belongings from a nearby jury room[1] before departing. During this time, defendant confronted and spoke to multiple jurors about the case. When Dan, Dan's girlfriend (Kathryn), and defendant's mother subsequently exited the courtroom, Dan and Kathryn also spoke to jurors as the jurors were leaving. Video footage of these interactions, without audio, was captured by video cameras in and around the courthouse. When Dan's attorney exited the courtroom approximately two and one-half minutes after defendant first left the courtroom, he joined defendant and defendant's group in the lobby and they departed from the courthouse.

On 19 April 2016, defendant was arrested and charged with six counts of harassment of a juror pursuant to N.C.G.S. § 14-225.2(a)(2), which provides that an individual "is guilty of harassment of a juror if" the individual "[a]s a result of the prior official action of another as a juror in a . . . trial, threatens in any manner or in any place, or intimidates the former juror or his spouse." Defendant was also charged with one count of conspiracy to commit harassment of a juror pursuant to N.C.G.S. § 14-225.2(a)(2) (2015). The Watauga County grand jury subsequently indicted defendant for these charges.

1. This "jury room" or "jury lounge" appears to be on the opposite side of the lobby from the courtroom and is where the jury would go for breaks during the trial.

Defendant filed pretrial motions to dismiss, including a motion arguing that N.C.G.S. § 14-225.2(a)(2) is unconstitutional under the First Amendment and a motion arguing that the statute is unconstitutionally vague and overbroad. The trial court denied defendant's motions.

At trial, six jurors from Dan's trial testified as witnesses for the State. At the close of the State's evidence, defendant renewed his pretrial motions and also moved to dismiss for insufficiency of the evidence. The trial court denied these motions. Following the presentation of defendant's evidence, including his own testimony, defendant renewed his motions to dismiss at the close of all evidence. The trial court again denied these motions. At the charge conference, defendant requested that the trial court instruct the jury that in order to find him guilty, the jury must find that his conduct constituted a true threat or that he intended to intimidate the jurors. The trial court denied the requested instruction.

The jury found defendant not guilty of the six counts of harassment of a juror. However, the jury found defendant guilty of the single offense of conspiracy to commit harassment of a juror. The trial court sentenced defendant to forty-five days in the custody of the sheriff of Watauga County, suspended his active sentence, and placed defendant on eighteen months of supervised probation. Additionally, the trial court ordered defendant, *inter alia*, to perform fifty hours of community service, successfully complete an anger management course and follow any recommended treatment, and obtain twenty hours of weekly employment. Further, the trial court imposed "a curfew of 6 p.m. to 6 a.m. for a period of four months . . . which can be accomplished by electronic monitoring," requiring defendant to remain at his residence except for employment and school classes during the period of the curfew. Defendant appealed.

At the Court of Appeals, defendant first argued that the trial court erred in denying his motions to dismiss on the basis of the constitutionality of N.C.G.S. § 14-225.2(a)(2). *State v. Mylett*, 822 S.E.2d 518, 523 (N.C. Ct. App. 2018). The Court of Appeals majority disagreed, concluding that the statute applies to nonexpressive conduct and does not implicate the First Amendment. *Id.* at 524. Further, the majority determined that even assuming the First Amendment was implicated, the statute survives intermediate scrutiny as a content-neutral restriction. *Id.* at 524–26. Additionally, the majority rejected defendant's contentions that the undefined term "intimidate" renders N.C.G.S. § 14-225.2(a)(2) unconstitutionally void for vagueness and that the trial court erred in denying defendant's request for a jury instruction defining "intimidate" as

requiring a "true threat." *Id.* at 526, 530. Finally,[2] the majority concluded that the trial court did not err in denying defendant's motion to dismiss the conspiracy charge for insufficient evidence. *Id.* at 531.

Writing separately, Chief Judge McGee dissented, opining first that N.C.G.S. § 14-225.2(a)(2) is unconstitutional both on its face and as applied to defendant and that the trial court erred in denying defendant's request for a jury instruction defining "intimidation." *Id.* at 531–41 (McGee, C.J., dissenting). Moreover, Chief Judge McGee concluded that even in the absence of any "true threat" requirement, the State presented insufficient evidence to support the conspiracy charge. *Id.* at 541–45.

On 7 January 2019, defendant filed a notice of appeal as of right based on the dissenting opinion in the Court of Appeals pursuant to N.C.G.S. 7A-30(2).

Analysis

Defendant argues that the Court of Appeals majority erred in: (1) concluding that the State presented sufficient evidence of a conspiracy to threaten or intimidate a juror; (2) rejecting defendant's constitutional challenges to N.C.G.S. § 14-225.2(a)(2) on the basis that it violates his First Amendment rights and that it is unconstitutionally vague and overbroad; and (3) concluding that the trial court did not err in denying defendant's requested jury instruction defining "intimidate." We conclude that there was insufficient evidence of a conspiracy to threaten or intimidate a juror and therefore the trial court erred in denying defendant's motion to dismiss the conspiracy charge. In light of our holding, we need not address defendant's other contentions.

When ruling on a defendant's motion to dismiss for sufficiency of the evidence, the trial court must determine "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980) (first citing *State v. Roseman*, 279 N.C. 573, 580, 184 S.E.2d 289, 294 (1971); then citing *State v. Mason*, 279 N.C. 435, 439, 183 S.E.2d

2. The majority also rejected defendant's challenges to evidentiary rulings by the trial court, including defendant's arguments "that the trial court erroneously (1) excluded a Facebook post proffered by defendant to impeach a juror-witness and (2) admitted the juror-witnesses' testimony about the fraternity party fight underlying Dan's trial, while excluding defendant's testimony about the same issue." *State v. Mylett*, 822 S.E.2d 518, 528 (N.C. Ct. App. 2018). The dissenting judge did not address these issues, and defendant did not seek further review of these issues in this Court.

661, 663 (1971)). "Substantial evidence is evidence from which any rational trier of fact could find the fact to be proved beyond a reasonable doubt." *State v. Sumpter*, 318 N.C. 102, 108, 347 S.E.2d 396, 399 (1986) (first citing *State v. Pridgen*, 313 N.C. 80, 94–95, 326 S.E.2d 618, 627 (1985); then citing *State v. Jones*, 303 N.C. 500, 504, 279 S.E.2d 835, 838 (1981)). "[T]he trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor." *State v. Miller*, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009) (citing *State v. McCullers*, 341 N.C. 19, 28–29, 460 S.E.2d 163, 168 (1995)). "A motion to dismiss should be granted, however, 'where the facts and circumstances warranted by the evidence do no more than raise a suspicion of guilt or conjecture since there would still remain a reasonable doubt as to defendant's guilt.' " *State v. Turnage*, 362 N.C. 491, 494, 666 S.E.2d 753, 755 (2008) (quoting *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988)); *see also Sumpter*, 318 N.C. at 108, 347 S.E.2d at 399 ("Evidence is not substantial if it arouses only a suspicion about the fact to be proved, even if the suspicion is strong." (citing *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983))). "Whether the State has presented substantial evidence is a question of law, which we review de novo." *State v. China*, 370 N.C. 627, 632, 811 S.E.2d 145, 149 (2018) (citing *State v. Cox*, 367 N.C. 147, 150–51, 749 S.E.2d 271, 274–75 (2013)).

"A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means." *State v. Gibbs*, 335 N.C. 1, 47, 436 S.E.2d 321, 347 (1993) (quoting *State v. Bindyke*, 288 N.C. 608, 615–16, 220 S.E.2d 521, 526 (1975)). "In order to prove conspiracy, the State need not prove an express agreement; evidence tending to show a mutual, implied understanding will suffice." *State v. Winkler*, 368 N.C. 572, 575, 780 S.E.2d 824, 827 (2015) (quoting *State v. Morgan*, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991)). Because "[t]he conspiracy is the crime and not its execution," *Gibbs*, 335 N.C. at 47, 436 S.E.2d at 347 (citation omitted), "[t]he crime of conspiracy is complete when there is a meeting of the minds and no overt act is necessary," *State v. Christopher*, 307 N.C. 645, 649, 300 S.E.2d 381, 383 (1983) (citing *State v. Gallimore*, 272 N.C. 528, 158 S.E.2d 505 (1969)). Nonetheless, there must exist an agreement, and the parties to a conspiracy must "intend[ ] the agreement to be carried out at the time it was made." *State v. Jenkins*, 167 N.C. App. 696, 700, 606 S.E.2d 430, 433 (citing *State v. Diaz*, 155 N.C. App. 307, 319, 575 S.E.2d 523, 531 (2002)), *aff'd per curiam*, 359 N.C. 423, 611 S.E.2d 833 (2005). Moreover, while a conspiracy can be established through circumstantial evidence, there must be "such evidence to prove the agreement directly or such a state of facts that an agreement may be legally inferred. Conspiracies

cannot be established by a mere suspicion, nor does evidence of mere relationship between the parties or association show a conspiracy." *State v. Williams*, 255 N.C. 82, 86, 120 S.E.2d 442, 446 (1961) (quoting *State v. Phillips*, 240 N.C. 516, 521, 82 S.E.2d 762, 766 (1954)).

Here, the unlawful act at issue is the alleged violation of N.C.G.S. § 14-225.2(a)(2), which, as noted above, provides that an individual "is guilty of harassment of a juror if" the individual "[a]s a result of the prior official action of another as a juror in a . . . trial, threatens in any manner or in any place, or intimidates the former juror or his spouse." Accordingly, in order to survive a motion to dismiss, the State was required to present substantial evidence showing that defendant entered into an agreement with one or more persons to threaten or intimidate a juror from his brother's trial.[3]

Viewing the evidence in the light most favorable to the State, including the videos from the courthouse and the witness testimony, there is simply insufficient evidence to reasonably infer the existence of any agreement to threaten or intimidate a juror. The evidence shows that at the conclusion of Dan's sentencing hearing, defendant exited the courtroom from a door off of the lobby (the courtroom door) and was standing alone by a common-area table waiting with his hands in his pockets when the first of the jurors, Rose Nelson, exited from the courtroom door further down the hall (the far door). Nelson testified that as she walked past defendant, heading for the stairwell to exit the building, defendant stated that "he hoped that [she] could live with [her]self because [she] had convicted an innocent man, and then as [she] was making [her] way to the stairs trying to get down the stairs, he was saying something about the crooked Boone police, and he hoped that [she] slept well." After Nelson left the courthouse, defendant slowly paced across the room and was waiting by the courtroom door when four more jurors, Kinney Baughman, William Dacchille, Denise Mullis, and

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3. Defendant argues that in order for N.C.G.S. § 14-225.2(a)(2) to pass constitutional muster, "intimidates" must be defined to require a "true threat," which are "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *State v. Bishop*, 368 N.C. 869, 87 8 n.3, 787 S.E.2d 814, 821 n.3 (2016) (quoting *Virginia v. Black*, 538 U.S. 343, 359 (2003)). We assume, without deciding, that "intimidates" for the purposes of N.C.G.S. § 14-225.2(a)(2) *does not* require "a serious expression of an intent to commit an act of unlawful violence." To be clear, we express no opinion on the constitutionality of N.C.G.S. § 14-225.2(a)(2) or whether "intimidates" requires a true threat. We hold that, assuming *arguendo* that the statute should be construed as urged by the State, the State did not present substantial evidence that defendant entered into an agreement with another person to threaten or intimidate a juror.

Lorraine Ratchford, exited the far door and crossed the lobby to the jury room. According to their testimony, as these jurors walked by defendant, defendant stated to Baughman "that his brother was an innocent man, [and] that [Baughman] had done wrong," told Dacchille that "[Dan is] an innocent man, he's an innocent man," stated to Mullis that she "got it wrong, that [she] made a mistake," and told Ratchford, "congratulations, you just ruined his life."

As these four jurors were entering the jury room across the lobby, Kathryn, defendant's mother, and Dan, in that order, exited the courtroom door, approximately one minute and twenty seconds after defendant first left the courtroom. Kathryn was crying as she left the courtroom, and defendant had a brief interaction with her in which he came from behind the door and placed his hand on her head and shoulder to console her as she moved around the door and towards the nearby wall. As this was happening, Dan exited the doorway last and, before having any interaction with defendant, spotted Baughman exiting the jury room. Dan, shaking his head, immediately walked across the lobby toward Baughman and began speaking to him. Defendant and Kathryn then walked across the lobby and were standing behind Dan with defendant's mother as Baughman exited the jury room and started walking back toward the far door. Kathryn also began speaking to Baughman and, according to Baughman, stated: "you convicted him, you sent him to jail, you ruined his life and it's all your fault." Dan and Kathryn were both speaking to Baughman as he walked past defendant's group, and both of them moved back to make way for him to walk toward the hallway. While this was occurring, Dacchille, Mullis, and Ratchford were still in the jury room and could not hear what was being said, except Ratchford heard Kathryn "screaming he'll never get a job."

Baughman was nearing the hallway and the far door when defendant said something to him, at which point Baughman turned back and engaged with defendant while crossing the lobby again, this time heading for the stairwell. Baughman attempted to explain the jury's verdict while walking slowly toward the stairwell. Baughmen testified that as "a former professor, [he] like[s] to explain things." According to Baughman, defendant was not raising his voice but "was clearly upset about the verdict" and defendant's tone was "not pleasant." Baughman explained: "Well, it's firm, but, I mean, he's not yelling at me here. So the way I recall was, [defendant was saying] my brother was innocent, he's an innocent man, and, you know, we had done wrong. In this case, you know, I'd done - - you done wrong." During this discussion, defendant and Kathryn both moved away from Baughman, insuring his path was

not blocked, as Baughman headed for the stairwell. The video shows that after Baughman entered the stairwell, defendant walked over to the stairwell twelve seconds later, followed by Dan, their mother, and then Kathryn. Baughman stated that Kathryn was "the one that was really screaming and yelling at me more than anybody else, but they were all pointing their fingers in my face as I was sitting down – I was standing in the stairway and they're hanging over the railing and telling me I ruined this kid's life." Approximately ten or eleven seconds later, defendant's group returned to where they were initially standing in the lobby. The attention of defendant, Dan, and Kathryn was focused almost exclusively on Baughman from the time he exited the jury room, and neither Dachille nor Ratchford had any more troubling interactions with defendant's group as they left the jury room and went down the stairs to leave.

Finally, the last of the six jurors, Charlotte Lino (Lino), came from the hallway near the far door, crossed the lobby, and started down the stairs, where she encountered Mullis waiting in the stairwell. Lino testified that as she passed defendant's group, one of them told her "he'll never get a job, he won't finish school, and we lie just like the cops do, very intimidating." Shortly after Lino entered the stairwell, Dan's attorney exited the courtroom and joined defendant's group in the lobby, at which point defendant's group immediately moved towards the stairwell to exit the courthouse. Lino testified that defendant's group passed Mullis and her on the way down the stairs, that "it was so crammed in on the staircase," and that defendant's group was talking to them as they passed, telling them "how bad [they] were." According to Mullis, as defendant's group passed them, Dan said "you really blew it," Kathryn said "he'll never get a job" in an "angry, sad" tone, and one member of defendant's group "passed very closely to where somebody was touching [her]." Approximately two and one half minutes after defendant first left the courtroom alone and entered the lobby, defendant's group exited the courthouse.

The evidence is almost entirely devoid of any interactions between defendant and Dan or defendant and Kathryn from which the formation of any agreement can be inferred. The State does not identify any substantial evidence regarding defendant's conduct prior to the incident in the lobby tending to show any agreement with Dan or Kathryn. Regarding the incident itself, apart from defendant's very brief gesture to console Kathryn, it is not clear that any of the three even made eye contact during the incident, let alone communicated in any manner from which a meeting of the minds can reasonably be inferred. The only clear interaction between these individuals, prior to the arrival of Dan's

attorney, was with defendant's mother, who at times attempted to keep defendant and Dan from speaking to the jurors and who the State does not allege was a part of any conspiracy. None of the State's witnesses testified that they heard any statements or saw any actions between defendant and Dan or defendant and Kathryn indicating any agreement to threaten or intimidate a juror.

Nonetheless, the State points to the purported "parallel conduct" of defendant, Dan, and Kathryn, contending that "a jury can infer a conspiracy based on highly synchronized, parallel conduct in furtherance of a crime." We agree with this statement in principle; yet, such an inference would be far stronger where the conduct at issue is more synchronized, more parallel, and more clearly in furtherance of a crime. For instance, given that the only evidence of contact with the jurors by defendant, Dan, or Kathryn was during this relatively brief incident in the lobby, and that most of the allegedly unlawful contact with the jurors occurred when defendant was in the lobby alone, before defendant's group exited the courtroom, the conduct here is not particularly synchronized. Once defendant's group entered the lobby, the conduct of defendant, Dan, and Kathryn in the lobby while they were waiting for Dan's attorney was hardly the work of a master plan. Moreover, while defendant was acquitted of the charges of harassment of a juror by threats or intimidation and we express no opinion on the sufficiency of the evidence with respect to those charges, the evidence was far from overwhelming. Put simply, this is not a situation like a drug transaction or a bank robbery, where it is evident that an unlawful act has occurred, and where the degree of coordination associated with those unlawful acts renders an inference of "mutual, implied understanding" between the participants far more reasonable. *Winkler*, 368 N.C. at 575, 780 S.E.2d at 827 (quoting *Morgan*, 329 N.C. at 658, 406 S.E.2d at 835).[4]

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4. For example, in *State v. Abernathy*, the Court determined that there was no "direct evidence that the defendant . . . expressly agreed" to commit a house robbery, but "the circumstantial evidence [was] sufficient to create an inference that [the defendant] knew of an agreement to rob the [victim's] residence and that there was an implied understanding between him and the others to accomplish this purpose." 295 N.C. 147, 165, 244 S.E.2d 373, 385 (1978). There, the defendant was with one of the robbers beforehand and asked a witness "if [the witness] wanted to make some money to go check out a place." *Id.* Additionally, the evidence showed that the defendant drove the robbers to the house, whereupon he drove by the house one time, turned around at an intersection, and parked at a nearby graveyard, at which point the robbers exited the car with masks, guns and tape and entered the house for thirty minutes to an hour. *Id.* While the robbers were in the house, the defendant drove up and down the road in front of the house "waiting for the actual robbers in order to assist them in escaping after the robbery was completed." *Id.* at 165–66, 244 S.E.2d at 385.

The dissent asserts that our analysis "appears . . . to amount to an analysis of the weight that should be given to the State's evidence," which is a question for the jury, "rather than to its sufficiency." The weight of the evidence is, of course, to be determined by the jury, but only when the State has first presented *substantial evidence* of each element of the offense—that is, evidence from which a rational juror could find the fact to be proved beyond a reasonable doubt. *See Sumpter*, 318 N.C. at 108, 347 S.E.2d at 399 ("Evidence is not substantial if it arouses only a suspicion about the fact to be proved, even if the suspicion is strong." (citing *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983))).[5] Further, contrary to the dissent's assertion, we do not suggest that proof that alleged conspirators committed a crime is necessary to prove conspiracy; rather, we note only that when the State relies on evidence of similar and simultaneous conduct to establish an agreement to commit an unlawful act, the fact that the evidence of such conduct, even where similar, leaves ample questions of whether an unlawful act has even been committed, tends to lessen the reasonableness of any inference from circumstantial evidence that the individuals involved had an agreement *to commit an unlawful act*—here, an agreement to "threaten" or

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5. The dissent also asserts that our approach is inconsistent with this Court's decision in *State v. Whiteside*, in which the Court stated:

> Direct proof of the charge is not essential, for such is rarely obtainable. It may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy. When resorted to by adroit and crafty persons, the presence of a common design often becomes exceedingly difficult to detect. Indeed, the more skillful and cunning the accused, the less plainly defined are the badges which usually denote their real purpose. Under such conditions, the results accomplished, the divergence of those results from the course which would ordinarily be expected, the situation of the parties, and their antecedent relations to each other, together with the surrounding circumstances, and the inferences legitimately deducible therefrom, furnish, in the absence of direct proof, and often in the teeth of positive testimony to the contrary, ample ground for concluding that a conspiracy exists.

204 N.C. 710, 712–13, 169 S.E. 711, 712 (1933) (citations omitted). We reiterate that direct evidence of an explicit agreement is not required and that the State may prove conspiracy through circumstantial evidence. *See Winkler*, 368 N.C. at 575 (stating that "the State need not prove an express agreement; evidence tending to show a mutual, implied understanding will suffice" (quoting *Morgan*, 329 N.C. at 658, 406 S.E.2d at 835)). Here, taking the evidence in the light most favorable to the State, we conclude only that the circumstantial evidence and the "inferences legitimately deducible therefrom" amount solely to suspicion or conjecture of the fact to be proved and that the evidence is insufficient to give rise to a reasonable inference that defendant entered an agreement to commit an unlawful act—specifically, an agreement to threaten or intimidate a juror.

"intimidate" a juror, as required to support a felony conviction under N.C.G.S. § 14-225.2(a)(2).

In sum, we conclude that the evidence, taken in the light most favorable to the State, raises no more than a suspicion or conjecture of defendant's guilt. As such, the State failed to present substantial evidence that defendant conspired to threaten or intimidate a juror. The trial court therefore erred in denying defendant's motion to dismiss for insufficient evidence.

Conclusion

For the reasons stated, we reverse the decision of the Court of Appeals finding no error in the trial court's judgment convicting defendant for conspiracy to commit harassment of a juror pursuant to N.C.G.S. § 14-225.2(a)(2). Because we reach this decision based upon our conclusion that the trial court erred in denying defendant's motion to dismiss the conspiracy charge for insufficient evidence, we decline to address defendant's other arguments, including his constitutional challenges to N.C.G.S. § 14-225.2(a)(2). *See James v. Bartlett*, 359 N.C. 260, 266, 607 S.E.2d 638, 642 (2005) ("However, appellate courts must 'avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds.' " (quoting *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002) (per curiam))). This case is remanded to the Court of Appeals for further remand to the trial court with instructions to vacate defendant's conviction for conspiracy to commit harassment of a juror and the judgment entered thereon.

REVERSED.

Justice ERVIN, dissenting.

A majority of my colleagues have concluded that the State's evidence, which tends to show that defendant, acting simultaneously with his brother and his brother's girlfriend, confronted a series of jurors leaving the courtroom in which they had just voted to convict defendant's brother of assaulting a law enforcement officer for the purpose of intensely criticizing the verdict rendered by those jurors, does not suffice to establish the existence of the agreement necessary to support defendant's conspiracy conviction. In light of my belief that the Court's decision fails to analyze the evidence in the light most favorable to the State and that, when considered in light of the applicable legal standard, the evidence contained in the record provided ample support for the

jury's determination that the necessary agreement did, in fact, exist, I respectfully dissent from the Court's decision.

According to well-established North Carolina law, we are required to evaluate the validity of defendant's challenge to the sufficiency of the evidence to support his conspiracy conviction by viewing the evidence in the light most favorable to the State. *State v. Kemmerlin*, 356 N.C. 446, 473, 573 S.E.2d 870, 889 (2002) (citing *State v. Lucas*, 353 N.C. 568, 581, 548 S.E.2d 712, 721 (2001)). The State's evidence need not be compelling in order to prevent the allowance of a defendant's dismissal motion; instead, the State's evidence need only be "substantial," with "substantial evidence" being the "amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *Id.* (citing *State v. Frogge*, 351 N.C. 576, 584, 528 S.E.2d 893, 899 (2000)). For that reason, "the question for the trial court is not one of weight, but of the sufficiency of the evidence," *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (2001) (citing *Lucas*, 353 N.C. at 581, 546 S.E.2d at 721), with the trial court being required to "draw[ ] all reasonable inferences from the evidence in favor of the State's case." *Id.* (quoting *Lucas*, 353 N.C. at 581, 546 S.E.2d at 721); *see also State v. Lowery*, 309 N.C. 763, 766, 309 S.E.2d 232, 236 (1983). As a result, the ultimate issue raised by defendant's challenge to the sufficiency of the evidence to support his conspiracy conviction is whether a reasonable juror could have rationally concluded that defendant was guilty of the crime that he was charged with committing.

"A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act by unlawful means." *State v. Lamb*, 342 N.C. 151, 155, 463 S.E.2d 189, 191 (1995). "[T]he State need not prove an express agreement"; instead, "evidence tending to show a mutual, implied understanding will suffice." *State v. Morgan*, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991); *see also State v. Lawrence*, 352 N.C. 1, 24–25, 530 S.E.2d 807, 822 (2000); *State v. Smith*, 237 N.C. 1, 16, 74 S.E.2d 291, 301 (1953). "The existence of a conspiracy may be established by circumstantial evidence." *State v. Bell*, 311 N.C. 131, 141, 316 S.E.2d 611, 617 (1984) (citing *State v. Bindyke*, 288 N.C. 608, 616, 220 S.E.2d 521, 526 (1975)); *see also Lawrence*, 352 N.C. at 25, 530 S.E.2d at 822 (citing *Bindyke*, 288 N.C. at 616, 220 S.E.2d at 526) (stating that "[t]he existence of a conspiracy may be shown with direct or circumstantial evidence"); *State v. Horton*, 275 N.C. 651, 659, 170 S.E.2d 466, 471 (1969) (citing *State v. Butler*, 269 N.C. 733, 737, 153 S.E.2d 477, 481 (1967)) (stating that "a criminal conspiracy may be established by circumstantial evidence from which the conspiracy may be legitimately inferred"); *State v. Wrenn*, 198 N.C 260, 263, 151 S.E.2d 261, 263 (1930)

(stating that the existence of a conspiracy may be "inferred from facts and circumstances"); *State v. Knotts*, 168 N.C. 173, 188, 83 S.E. 972, 979 (1914) (stating that "[t]his joint assent of minds, like all other facts of a criminal case, may be established as an inference of the jury from other facts proved; in other words, by circumstantial evidence"). As the Court recognized more than three-quarters of a century ago, "[d]irect proof of the [conspiracy] charge is not essential, for such is rarely obtainable," so that the existence of a conspiracy "may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively," "point unerringly to the existence of a conspiracy." *State v. Whiteside*, 204 N.C. 710, 712, 169 S.E. 711, 712 (1933) (citing *Wrenn*, 198 N.C. at 260, 151 S.E. at 261). "[T]he results accomplished, the divergence of those results from the course which would ordinarily be expected, the situation of the parties and their antecedent relations to each other, together with the surrounding circumstances, and the inferences legitimately deducible therefrom" provide "ample ground for concluding that a conspiracy exists." *Id.* at 713, 169 S.E.2d at 712. "Ordinarily the existence of a conspiracy is a jury question," and where reasonable minds could conclude that a meeting of the minds exists, the trial court does not err in denying a motion to dismiss for insufficiency of the evidence. *State v. Larrimore*, 340 N.C. 119, 156, 456 S.E.2d 789, 809 (1995).

The record developed before the trial court established that Dan Mylett had been charged with and was convicted of assaulting a governmental official based upon an incident during which he spat upon an officer employed by the Boone Police Department. During the trial of that case, Dan Mylett, Dan Mylett's girlfriend Kathyn Palmer, and defendant, who is Dan Mylett's brother, appeared to be watching the members of the jury during breaks in the proceedings. For example, Charlotte Lino, who served on the jury at Dan Mylett's trial, testified that defendant and Dan Mylett "hung out . . . very close" to the door of the jury room, looked into the room, and "circl[ed] the table" in the hallway outside the jury room. In addition, Kinney Baughman, who also served on the jury at Dan Mylett's trial, testified that defendant and Dan Mylett made frequent eye contact with members of the jury during their breaks throughout the trial and that defendant, Dan Mylett, and Ms. Palmer stared at them "intently."

After the jury returned a verdict convicting Dan Mylett of assault upon a governmental official, six of the members of the jury remained in the courtroom, which was located on the second floor near a stairwell that led to the first floor entrance, for the sentencing hearing. At

the conclusion of the sentencing hearing, surveillance video footage showed that defendant left the courtroom by himself before anxiously pacing the hallway outside the courtroom. When he stopped pacing, defendant stood on the opposite side of the hallway facing the doors that led into the courtroom.

As Juror Rose Nelson left the courtroom and walked through the hallway toward the stairwell, defendant stared at her and told her that he "hoped that [she] could live with [her]self," that "[she] had convicted an innocent man," and that "he hoped that [she] slept well." According to Ms. Nelson, defendant spoke in a "very threatening" tone of voice and continued to make comments in her direction even after she entered the stairwell and began walking down the steps.

At that point, defendant re-crossed the hallway, stood between the two doors that led to the courtroom, and faced the entrance through which each of the jurors left the courtroom. While defendant stood alone in the hallway, jurors Kinney Baughman, William Dacchille, Denise Mullis, and Lorraine Ratchford left the courtroom together. As this group of jurors walked past him to enter the jury room to retrieve their belongings, defendant appears to have stared at them and told the four jurors, in an increasingly "louder," "more aggressive," and "more aggravated" manner, that his brother was "an innocent man," that they had "done wrong," and that they had "ruined [his brother's] life." Ms. Ratchford testified that defendant had "intercepted" and "accost[ed]" her as she proceeded to the jury room and said, "congratulations, you just ruined [my brother's] life." Similarly, Ms. Mullis testified that, as she walked to the jury room, defendant told her in a "very angry" tone that she had "got it wrong" and had "made a mistake." In the same vein, Mr. Dacchille testified that defendant told him that "[Dan Mylett was] an innocent man, he's an innocent man."

At that point, Dan Mylett, Ms. Palmer, and defendant's mother, each of whom were visibly upset, left the courtroom and joined defendant in the hallway, where defendant made a brief attempt to console Ms. Palmer. Upon leaving the courtroom, Dan Mylett walked directly toward the jury room and was standing outside of that room when Mr. Baughman re-entered the hallway preparatory to leaving the building. As Mr. Baughman walked toward the far courtroom door, defendant, Dan Mylett, and Ms. Palmer approached him, with defendant having "immediately engaged" Mr. Baughman and telling Mr. Baughman that he "had done wrong" and that Dan Mylett "was an innocent man." According to surveillance video footage, defendant and Dan Mylett can be seen speaking to Mr. Baughman while defendant, Dan Mylett, and Ms. Palmer each

exhibited body language that expressed dissatisfaction and frustration. Mr. Baughman testified that defendant was "clearly upset," that his tone was "firm," and that defendant was "not yelling at" him.

While still in the jury room, Mr. Dacchille could hear that those associated with Dan Mylett were engaged with Mr. Baughman. In light of his concern that things would "get[ ] out of hand[,]" Mr. Dacchille made a "bee line for the stairwell" while the group accosted Mr. Baughman. Mr. Dacchille informed a law enforcement officer that the group associated with Dan Mylett was "abusing the jury" and were "yelling at the jurors" in a "belligerent" manner.

As Mr. Baughman neared the far courtroom door, he realized that he was going the wrong way. For that reason, Mr. Baughman reversed course and attempted to make his way around Dan Mylett's supporters in order to enter the stairwell and leave the courthouse. Although Mr. Baughman attempted to "explain" the jury's verdict and to tell Dan Mylett's supporters that there "was a lot of sympathy for [Dan Mylett] in there" while walking toward the stairwell, he "immediately got pounced" by Ms. Palmer.

Upon noticing that defendant was "getting himself upset," defendant's mother can be seen on video surveillance footage making multiple attempts to pull defendant back from Mr. Baughman, "pleading with him to stop" accosting the jurors and to refrain from following Mr. Baughman, and placing her hand over defendant's mouth as he attempted to speak to Mr. Baughman once Mr. Baughman had reached the stairwell. Unfortunately, however, defendant broke free from his mother's grip and walked around her, at which point defendant and other family members followed Mr. Baughman into the stairwell, where Mr. Baughman testified that Ms. Palmer "scream[ed] and yell[ed]" that Mr. Baughman had "sent [Dan Mylett] to jail" and that he had "ruined [Dan Mylett's] life and it's all [your] fault." According to Mr. Baughman, Dan Mylett's supporters "were all pointing their fingers in [his] face" and telling him that he had "ruined [Dan's] life."

As Ms. Mullis left the jury room in order to enter the stairwell, Dan Mylett's supporters returned to the hallway. Defendant and Dan Mylett both appeared to be staring at Ms. Mullis as they passed her; after Ms. Mullis had entered the hallway, Dan Mylett shook his head and threw his hand up. Shortly thereafter, Ms. Ratchford left the jury room and walked past Dan Mylett's supporters for the purpose of using the restroom. While she was in the restroom, Ms. Ratchford became concerned given that the actions of Dan Mylett's supporters were "so outside the bounds of propriety."

As the final juror, Ms. Lino, left the courtroom and crossed the hallway to enter the stairwell, defendant and Dan Mylett made a slight turn to face her and watched as she walked into the stairwell. Ms. Lino testified that Dan Mylett's supporters confronted her in a "loud," "angry," and "very intimidating" manner and yelled that Dan Mylett would "never get a job," that he wouldn't be able to "finish school," and that the jury "lie[d] just like the cops do." Ms. Mullis and Ms. Lino waited for Ms. Ratchford on a stairwell landing.

After the attorney who had represented Dan Mylett left the courtroom, Dan Mylett and his supporters entered the stairwell for the purpose of exiting the courthouse. Ms. Mullis and Ms. Lino were still waiting for Ms. Ratchford on the stairwell when Dan Mylett and his supporters passed them. As the group passed in close proximity to Ms. Mullis and Ms. Lino, they "shout[ed]" at them in an "angry" manner, told them "how bad [the jurors] were," and screamed that "[y]ou really blew it." Ms. Mullis testified that one member of the group had touched her, but she was unable to identify the individual who had made contact with her.

The conduct of defendant, Dan Mylett, and Ms. Palmer caused considerable consternation for the jurors whom the group had confronted. Ms. Nelson drove to her husband's place of employment immediately after leaving the courthouse and testified that she feared that she would be the subject of retaliatory conduct. Similarly, Ms. Lino purchased a security camera after her encounter with the group associated with Dan Mylett and expressed fear because she "didn't know what they were capable of doing." Mr. Baughman "spent th[e] weekend absolutely in fear of [his] life," considered "leaving town," checked to see that his security cameras were in good working order, and took leave from his employment to cope with his emotional distress, describing his encounter with Dan Mylett and his group as "one of the most disturbing experiences of [his] life." All of the jurors that defendant, Dan Mylett, and Ms. Palmer confronted feared for their safety after the incident in question, with a number indicating that they would refuse to serve on another jury in the future.

I have no hesitation in concluding that this evidence, when taken in the light most favorable to the State and considered in the light of the legal standard enunciated by this Court in *Whiteside*, amply supports a determination that defendant, Dan Mylett, and Ms. Palmer conspired to threaten or intimidate the members of the jury that convicted Dan Mylett of assaulting a governmental official. As a result of the fact that defendant and Dan Mylett were brothers and the fact that defendant's attempt to console Ms. Palmer permits an inference that there was a

close affinity between the two of them as well, the jury could reasonably infer that all three of the alleged conspirators had "antecedent relations" with each other. *Whiteside*, 204 N.C. at 713, 169 S.E. at 712. The record evidence further shows that, even before the trial ended, defendant and Dan Mylett were placing themselves in close proximity to the members of the jury and engaging in actions that most people would find threatening or intimidating. After the jury returned its verdict, defendant, Dan Mylett, and Ms. Palmer, who were standing in close proximity to each other, confronted multiple jurors and made angry and provocative remarks to them that succeeded in placing the jurors in an exceedingly frightening position. As they did so, defendant, Dan Mylett, and Ms. Palmer said essentially the same kinds of things to multiple jurors simultaneously even though conduct of this nature "diverge[s]" from "the course which would ordinarily be expected" of responsible persons in the vicinity of a court of justice. *Id.*

I am satisfied that, when evaluating the evidence in this case in light of the analytical rubric suggested by this Court in *Whiteside*, a decision that continues to be cited by this Court for the purpose of describing the circumstances under which the agreement necessary to support a conspiracy conviction exists, *see, e.g.*, *State v. Winkler*, 368 N.C. 572, 576, 780 S.E.2d 824, 827 (2015), a reasonable juror could have easily found that there was a "mutual, implied understanding" between defendant, Dan Mylett, and Ms. Palmer to threaten or intimidate the members of the jury that convicted Dan Mylett of assaulting a governmental official, *Morgan*, 329 N.C. at 658, 406 S.E.2d at 835, given that each of these three individuals were "able mentally to appreciate" each other's conduct so as to make an implicit "agree[ment] to cooperate in the achievement of that objective" of threatening or intimidating the departing members of the jury. *State v. Sanders*, 208 N.C. App. 142, 146, 701 S.E.2d 380, 383 (2010) (citing 15A C.J.S. *Conspiracy* § 114 (2002)). For that reason, I believe that the evidence, when taken in the light most favorable to the State, permitted the jury to find the existence of the necessary agreement between defendant, Dan Mylett, and Ms. Palmer to threaten or intimidate a juror, *see Winkler*, 368 N.C. at 581–82, 780 S.E.2d at 829 (holding that evidence tending to show that defendant had mailed an unmarked bottle that had been stuffed with tissue to prevent it from rattling and which contained controlled substances to an individual with whom he had a prior relationship using an address which the individual had not provided to his probation officer and evidence that defendant was unable to account for the remaining controlled substances that he should have possessed based upon the prescriptions that had been written for him or his reasons for mailing the controlled substances rather

than simply carrying them on his person was sufficient to support the defendant's conspiracy conviction); *Lawrence*, 352 N.C. at 25, 530 S.E.2d at 822 (stating that "[t]he mutual, implied understanding between defendant and [his alleged co-conspirator] is apparent from the effortless manner in which they supported each other throughout the commission of the murder and kidnaping"); *State v. Gibbs*, 335 N.C. 1, 48–49, 436 S.E.2d 321, 348 (1993) (holding that evidence tending to show that the defendant and his alleged co-conspirator watched another person leave a residence before approaching it and cooperating in the commission of a burglary constituted sufficient evidence to support the defendant's conspiracy conviction); *State v. Polk*, 309 N.C. 559, 565, 308 S.E.2d 296, 299 (1983) (holding that evidence tending to show that three different individuals committed a series of sexual assaults upon the prosecuting witness after luring her to a secluded location was sufficient to support the defendant's conspiracy conviction), with the evidence of defendant's guilt in this case consisting of much more than "evidence of mere relationship between the parties . . . ." *State v. Williams*, 255 N.C. 82, 86, 120 S.E.2d 442, 446 (1961) (quoting *State v. Phillips*, 240 N.C. 516, 521, 82 S.E.2d 762, 766 (1954)).

In reaching a contrary conclusion, the Court asserts that "[t]he evidence is almost entirely devoid of any interactions between [defendant, Dan Mylett, or Ms. Palmer] from which the formation of any agreement can be inferred." As has already been demonstrated, however, well-established North Carolina law permits a jury to find the necessary agreement based upon "a mutual, implied understanding." *Morgan*, 329 N.C. at 658, 406 S.E.2d at 835. Thus, while I agree with my colleagues that the record does not contain any direct evidence of an explicit agreement between defendant, Dan Mylett, and Ms. Palmer to threaten or intimidate the members of the jury that convicted Dan Mylett of spitting on a law enforcement officer, the absence of such evidence does not stand as an obstacle to the finding of an unlawful, implied understanding sufficient to support defendant's conspiracy conviction.

In addition, while acknowledging that the agreement necessary to support a conspiracy conviction can be inferred from "parallel conduct," the Court disregards the extensive evidence that defendant, Dan Mylett, and Ms. Palmer engaged in highly "parallel" conduct when they confronted members of the jury that convicted Dan Mylett of assaulting a governmental official on the grounds that "such an inference would be far stronger where the conduct at issue is more synchronized, more parallel, and more clearly in furtherance of a crime." Aside from the fact that this portion of the Court's analysis appears to me to amount to an

analysis of the weight that should be given to the State's evidence, rather than to its sufficiency, and the fact that the rubric upon which the Court relies in rejecting the State's "parallel conduct" analysis fails to track the approach that the Court adopted in *Whiteside* and lacks support in any of our prior decisions, I am unable to agree with my colleagues that the conduct in which defendant, Dan Mylett, and Ms. Palmer engaged was not "particularly synchronized," "parallel," or "in furtherance of a crime." In my opinion, the fact that defendant, Dan Mylett, and Ms. Palmer did essentially the same things to the same people in the same place and at the same time shows that the actions of each alleged co-conspirator closely "synchronized" with and "paralleled" the actions of the others. In addition, aside from the fact that proof that the alleged conspirators actually committed a crime is not a prerequisite for a conspiracy conviction, *Bindyke*, 288 N.C. at 616, 220 S.E.2d at 526 (citing *State v. Lea*, 203 N.C. 13, 27, 164 S.E. 737, 745 (1932)) (stating that "[t]he conspiracy is the crime and not its execution"), the record evidence clearly indicates that defendant, Dan Mylett, and Ms. Palmer, acting as a group and engaging in remarkably similar conduct, amply succeeded in threatening or intimidating the jurors whom they accosted in the hallway outside the courtroom.[1] Thus, I do not believe that any of the reasons that my colleagues have advanced in support of their decision to find the evidence insufficient to show the existence of the agreement necessary for defendant's conspiracy conviction are persuasive and would, on the contrary, find that the record contained sufficient evidence to permit a reasonable juror to infer that defendant, Dan Mylett, and Ms. Palmer conspired to threaten or intimidate the members of the jury that convicted Dan Mylett of assaulting a governmental official. As a result, rather than overturning defendant's conviction, I believe that the Court should proceed to address defendant's remaining challenges to the trial court's judgment, including his various constitutional claims, about the merits of which I express no opinion.

Justices NEWBY and DAVIS join in this dissenting opinion.

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1. As a matter of clarity, I do not understand either defendant, the dissenting judge at the Court of Appeals, or the majority of this Court to be stating that the record failed to contain sufficient evidence to establish that the conduct of defendant, Dan Mylett, and Ms. Palmer did threaten or intimidate the jurors who voted to convict Dan Mylett of spitting upon a law enforcement officer. Instead, my understanding is that defendant, the dissenting judge, and the majority of this Court have argued or concluded that the record does not show the existence of the agreement necessary to support defendant's conspiracy conviction. In light of this fact and the fact that the record contains ample evidence tending to show that the conduct of the group associated with Dan Mylett had the effect of threatening or intimidating the relevant jurors, I have focused the discussion contained in the text of this dissenting opinion upon the "agreement" issue rather than any "threaten or intimidate" issue.

WINSTON AFFORDABLE HOUS., LLC v. ROBERTS

[374 N.C. 395 (2020)]

WINSTON AFFORDABLE HOUSING, LLC D/B/A WINSTON SUMMIT APARTMENTS
v.
DEBORAH ROBERTS

No. 267PA19

Filed 1 May 2020

1. Landlord and Tenant—breach of lease—automatically renewing—acceptance of rent—right to evict

A Section 8 apartment complex did not waive the right to evict a tenant for breaches of her lease agreement when it accepted her rent payments knowing she had violated her lease. The Supreme Court held that a landlord does not, by accepting rent payments, waive the right to terminate an automatically renewing lease at the end of the lease term for breaches where (1) the landlord notifies the tenant of the breaches, (2) the landlord communicates to the tenant that, as a result of the breaches, the landlord will not renew the lease at the end of the then-effective lease term, (3) the landlord accepts rent from the tenant through the end of the then-effective lease term, and (4) non-renewal of the lease is specifically enumerated in the lease as a remedy in the event of a breach by the tenant.

2. Landlord and Tenant—termination of lease—federally subsidized housing—compliance with federal law

A summary ejectment action was remanded to the trial court for findings as to whether a Section 8 apartment complex complied with federal requirements when terminating a tenant's lease. Termination of a lease or a federal subsidy for a tenant in federally subsidized housing requires compliance with applicable federal law as incorporated in the terms of the lease.

3. Landlord and Tenant—termination of lease—nonpayment of rent—sufficiency of findings

A summary ejectment action was remanded because it did not contain sufficient findings to support the conclusion that a Section 8 apartment complex was entitled to possession of a tenant's apartment based on her nonpayment of rent. The record did not contain a termination notice regarding nonpayment of rent, and there were no findings as to whether a rent increase was made in accordance with the terms of the lease and federal requirements.

Justice NEWBY concurring in part and dissenting in part.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 828 S.E.2d 755, 2019 WL 2510879 (N.C. Ct. App. 2019), affirming a judgment entered on 3 November 2017 by Judge Denise S. Hartsfield in District Court, Forsyth County. Heard in the Supreme Court on 11 March 2020.

Blanco, Tackabery & Matamoros, P.A., by Elliot A. Fus and Chad A. Archer, for plaintiff-appellee.

Legal Aid of North Carolina, Inc., by Andrew Cogdell, Liza A. Baron, Valene K. Franco, and Celia Pistolis, for defendant-appellant.

William D. Rowe, Jack Holtzman, and Carlene McNulty, for North Carolina Justice Center; Elizabeth Myerholtz and Lisa Grafstein, for Disability Rights North Carolina; and J.L. Pottenger Jr., for Yale Law School Housing Clinic; amici curiae.

EARLS, Justice.

Deborah Roberts is a longtime tenant of the Winston Summit Apartments, having lived there for more than twenty years. The complex is owned by Winston Affordable Housing, LLC (WAH). Winston Summit Apartments is a project-based Section 8 property. This means that the U.S. Department of Housing and Urban Development (HUD) provides money to the landlord, subsidizing the rents for units at the property and lowering the effective rent for low-income tenants like Ms. Roberts. WAH receives the subsidy payment directly from HUD pursuant to a Housing Assistance Payments (HAP) contract between HUD and WAH. The subsidy is tied to the unit—it is not a voucher that a tenant could take to a different apartment complex to receive a subsidized rental rate.

In late 2016, WAH sought to evict Roberts by terminating her lease for alleged breaches primarily relating to her conduct toward property management staff and conditions in and around her unit. Roberts did not leave. WAH's property management company, Ambling Management Corp. (Ambling), filed a Complaint in Summary Ejectment on 5 January 2017, claiming that Roberts was a holdover tenant. On 9 January 2017, the property manager served Roberts with a ten-day notice to pay rent or quit, alleging that Roberts was in default under "the rental agreement dated 01/01/2007" in the amount of $547. Following a judgment in small claims court, WAH filed an amended complaint. Ultimately, the District Court in Forsyth County entered a judgment evicting Roberts and granting possession of the apartment in which she lived to WAH "based on

nonpayment of rent for January 2017 and the first part of February 2017." In doing so, the trial court determined that WAH had waived its claims as to Roberts's alleged lease breaches. The Court of Appeals affirmed, holding that the trial court's findings of fact supported its conclusion that Roberts's failure to pay rent entitled WAH to possession. *Winston Affordable Hous., L.L.C. v. Roberts*, 828 S.E.2d 755, 2019 WL 2510879 (N.C. Ct. App. 2019).

We reverse the Court of Appeals and remand to the trial court for further findings of fact. First, we hold that the trial court's findings do not support its determination that WAH had waived its right to terminate the lease based on the alleged breaches by Roberts. Second, we hold that terminating either a lease or a federal subsidy for a particular tenant in a federally-subsidized housing arrangement requires compliance with applicable federal law as incorporated in the terms of the lease. Third, we hold that the record does not contain sufficient findings to support the conclusion that WAH is entitled to possession on the basis of nonpayment of rent.

Background

Roberts is a sixty-two-year-old woman with cognitive disabilities. She has lived in her unit at the Winston Summit Apartments since 1997. Prior to the current dispute regarding her lease, she paid $139 per month in rent. Roberts receives a fixed income of $755 per month in addition to food stamps.

WAH alleged that Roberts violated her lease terms by:[1]

> (a) Harassing Ambling's staff about various issues—including but not limited to management's refusal to provide Tenant with a key to the mail room that would enable Tenant to access other tenants' mail and packages—and making and threatening false claims against Plaintiffs.
>
> (b) Spreading pest control powder in common areas and other tenants' apartments, despite the objection of other

1. Because the trial court determined that WAH waived these alleged breaches by accepting rent payments from Roberts, the trial court necessarily did not consider whether the evidence produced at trial amounted to material noncompliance, which would warrant termination of the lease by its terms. Accordingly, we consider only the claims included by WAH in its amended complaint, assuming their truth for the purposes of this opinion. *Cf. Renwick v. News & Observer Pub. Co.*, 310 N.C. 312, 315, 312 S.E.2d 405, 408 (1984) (stating that allegations in a complaint are taken as true when deciding whether they should be dismissed).

> tenants and despite Ambling's repeated requests that Tenant cease this practice and not interfere with the professional extermination services arranged by Plaintiffs.
>
> (c) Keeping her Premises in a cluttered, dirty and unsafe condition.
>
> (d) Violating "no smoking" policies.

On 3 October 2016, Roberts received a letter with the subject heading "Notice of Termination of Lease." The letter notified Roberts that "Winston Summit ha[d] elected to terminate [her] lease" and stated that her lease would terminate at the end of the then-current term, which ended 31 December 2016. It alleged that Roberts's "repeated lease violations" had "disrupted the livability of the property, adversely affected the health or safety of residents and staff, the peaceful enjoyment of other residents to the property, and interfered with the management of the property." The letter provided examples of the offending behavior. It then notified Roberts of when she would have to leave her unit and stated that she was "required to pay [her] full rental amount up to the day [she] move[d] out." The letter then stated: "You have the right to respond in writing or request a meeting within 10 days to dispute this proposed termination. You have the right to defend this action in court."

Roberts did not vacate her apartment by 31 December 2016. WAH's evidence at trial indicated that, on 4 January 2017, the on-site property manager saw Roberts at the mailbox and asked Roberts to come in and sign a document. The document was a HUD form titled "Owner's Certification of Compliance with HUD's Tenant Eligibility and Rent Procedures." In the section marked "Gross Rent Changes and Unit Transfers," the document listed "Tenant Rent" as $532. Roberts signed the document. At the same time, Roberts signed[2] a document titled "Lease Amendment" which read in part:

> This is to notify you that on the basis of our recent review of your income and family composition, your monthly rent has been adjusted as follows:
>
> | | |
> |---|---|
> | Contract Rent | $532.00 |
> | Utility Allowance | $61.00 |

2. Roberts appears to have written "Under duress" beneath her signature on this document. We do not consider or opine on the legal significance, if any, of this qualifier.

Assistance Payment	$0.00
Total Tenant Payment	$593.00
Tenant Rent	$532.00

> The new rent is effective with the rent due for the month of 12/31/2016. This notification amends Paragraph 3 of your lease agreement, which sets forth the amount of rent you pay each month. All other provisions of your lease remain in full force and effect. The next scheduled recertification is 01/01/2017.

Both the Lease Amendment and the Owner's Certification of Compliance with HUD's Tenant Eligibility and Rent Procedures were dated 4 January 2017.

On 5 January 2017, Ambling filed a summary ejectment action in Forsyth County Small Claims Court. Then, on 9 or 10 January 2017, Ambling delivered a document to Roberts titled "Ten-Day Notice to Pay Rent or Quit." The document alleged that Roberts owed $547 under her rental agreement and demanded that she pay the amount in ten days or surrender possession of her apartment. If she did not do so, the document stated that WAH would sue her.

On 7 February 2017, the magistrate in Small Claims Court entered judgment in the summary ejectment action in favor of Ambling. Roberts appealed to the District Court for a trial *de novo* on 14 February 2017. The Notice of Appeal form contained the following notice to the appealing party:

> If you are a tenant appealing from a summary ejectment judgment entered against you and you wish to stay on the premises until the appeal is heard, you must SIGN A BOND that you will pay your rent as it becomes due into the Clerk's office; you must PAY IN CASH the amount of rent in arrears as determined by the magistrate; and if the judgment was entered more than five (5) days before the next rental payment is due, you may also have to PAY IN CASH the prorated amount of rent due from the date the judgment was entered until the next rental payment is due. Ask the clerk for the bond form (AOC-CVM-304) to allow you to stay on the premises. If you have not signed this bond and paid the prorated amount of cash within ten (10) days after the judgment was entered, the landlord can

> ask to have the sheriff remove you from the premises even though the case is being appealed.

The magistrate did not assess any amount of rent in arrears to Roberts, but did determine that the rental rate was $532 per month. Consequently, Roberts began paying a monthly rent bond of $532 in mid-February.

On 6 April 2017, WAH filed an amended complaint which made two claims for relief.[3] First, WAH alleged that it was entitled to a judgment for summary ejectment on the basis of (1) alleged lease violations occurring prior to 3 October 2016 and (2) failure to pay rent for January 2017 and part of February 2017. Second, WAH alleged that it was entitled to a monetary judgment reflecting the unpaid rents for January 2017 and part of February 2017. Roberts filed an answer and counterclaims on 7 June 2017. The answer included ten defenses and five counterclaims. Only one of Roberts's counterclaims, that WAH's termination of her rental subsidy constituted an unfair and deceptive trade practice (UDTP) in violation of N.C.G.S. § 75-1.1, survived to trial.

The competing claims were tried in October 2017. On 3 November 2017, the trial court entered judgment in favor of WAH, granting WAH possession of the apartment on the basis of nonpayment of rent and dismissing all other pending claims and counterclaims. The trial court made the following findings of fact:

> 1. Plaintiff is the owner of Winston Summit Apartments, 137 Columbine Drive, Winston-Salem, North Carolina, where defendant has been a longtime resident. As of 2016, defendant was leasing Unit 311 (the "Premises") from plaintiff pursuant to a Model Lease for Subsidized Programs (the "Lease") signed on November 2, 2010.
>
> 2. On October 3, 2016, plaintiff provided defendant with a Notice of Termination of Lease, declaring that the Lease would be terminated effective December 31, 2016 for "material noncompliance" based on repeated lease violations, including violations of rules regarding pest control, smoking, housekeeping and other issues.

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3. While it is not entirely clear from the record, it seems that WAH was substituted for Ambling at some point prior to the filing of the amended complaint. This procedural aspect of the case has not been presented for our review.

3. Following the October 3, 2016 notice—but before the December 31, 2016 termination date—plaintiff accepted November and December 2016 rents from defendant.

4. Defendant did not vacate the Premises and has continued to reside there.

5. On or about January 4, 2017, defendant signed documents presented to her by the plaintiff's management, indicating that $532 per month in rent would be owed by defendant after December 31, 2016 (although defendant previously paid $139 per month in rent and received "Section 8" subsidized rental assistance from HUD).

6. This summary ejectment action was commenced on January 5, 2017.

7. On or about January 10, 2017, plaintiff's management gave defendant a "Ten-Day Notice to Pay Rent or Quit" regarding defendant's non-payment of January 2017 rent.

8. A judgment for ejectment was granted to plaintiff in Small Claims Court on February 7, 2017. Defendant appealed to District Court.

9. Rents since mid-February have been paid into Court by defendant. However, defendant never paid rents for January 2017 or for the portion of February 2017 accruing prior to her first payment of rent bond into Court.

10. Plaintiff filed an Amended Complaint on April 6, 2017. Plaintiff sought ejectment, based on the violations of the Lease listed in the October 3, 2017 [sic] notice as well as failure to pay January 2017 and early February 2017 rents. Plaintiff also sought a money judgment for the unpaid rents.

11. Defendant filed Counterclaims. The Counterclaims were dismissed prior to trial, except for a claim for Unfair and Deceptive Trade Practices for allegedly "improperly terminating defendant's Section 8 assistance."

12. Plaintiff represented in open court during trial that possession of the Premises was its only priority and that it would voluntarily waive any money judgment.

From these facts, the trial court concluded that WAH had "waived any right to evict defendant based on any Lease violations occurring prior to" its acceptance of rent for November and December 2016 and dismissed WAH's claim for breach of lease other than nonpayment of rent. The trial court also concluded that Roberts should be evicted because she did not pay rent for January 2017 and the first portion of February 2017. Finally, the trial court concluded that Roberts had presented insufficient evidence to establish a UDTP claim regarding the termination of her rental subsidy.

The Court of Appeals affirmed the trial court. First, the Court of Appeals considered whether Roberts was properly evicted for nonpayment of rent. The court acknowledged that the parties disputed the appropriate amount of rent, but it was uncontested on appeal that Roberts did not pay rent for January 2017 to mid-February 2017. *Roberts*, 828 S.E.2d 755, 2019 WL 2510879 at *3. As a result, the court concluded that Roberts's failure to pay rent "constituted a breach of lease entitling WAH to possession of the premises." *Id.*

Second, the Court of Appeals considered whether the trial court appropriately rejected Roberts's UDTP claim. The Court of Appeals determined that there was "insufficient evidence in this case of an injury proximately caused by the alleged act or practice" and concluded that Roberts had not proved her claim. *Id.* at *4.

WAH and Roberts each sought discretionary review in this Court. Roberts asked us to consider (1) whether she was properly evicted for nonpayment of rent and (2) whether WAH's alleged violations of federal regulations governing the subsidized housing program were unfair trade practices pursuant to N.C.G.S. § 75-1.1. WAH asked us to consider whether WAH had waived eviction on the basis of Roberts's alleged violations of the lease by accepting rent payments in November and December 2016. We granted both petitions.

Standard of Review

When reviewing a judgment entered following a bench trial,

> "the trial court's findings of fact have the force and effect of a jury verdict and are conclusive on appeal if there is competent evidence to support them, even though the evidence could be viewed as supporting a different finding." *Bailey v. State*, 348 N.C. 130, 146, 500 S.E.2d 54, 63 (1998) (citing *Curl v. Key*, 311 N.C. 259, 260, 316 S.E.2d 272, 273 (1984)). Although findings of fact "supported by

> competent, material and substantial evidence in view of the entire record[ ], are conclusive upon a reviewing court, and not within the scope [of its] reviewing powers," *In re Berman*, 245 N.C. 612, 616–17, 97 S.E.2d 232, 235 (1957), "[f]indings not supported by competent evidence are not conclusive and will be set aside on appeal." *Penland v. Bird Coal Co.*, 246 N.C. 26, 30, 97 S.E.2d 432, 436 (1957) (citing *Logan v. Johnson*, 218 N.C. 200, 10 S.E.2d 653 (1940)). "[F]acts found under a misapprehension of the law are not binding on this Court and will be set aside, and the cause remanded to the end that the evidence should be considered in its true legal light." *Hanford v. McSwain*, 230 N.C. 229, 233, 53 S.E.2d 84, 87 (1949) (citing, *inter alia*, *McGill v. Town of Lumberton*, 215 N.C. 752, 3 S.E.2d 324 (1939)).

In re Estate of Skinner, 370 N.C. 126, 139, 804 S.E.2d 449, 457–58 (2017) (alterations in original). The trial court's legal conclusions are reviewed de novo. *In re C.H.M.*, 371 N.C. 22, 28, 812 S.E.2d 804, 809 (2018) (quoting *In re Foreclosure of Bass*, 366 N.C. 464, 467, 738 S.E.2d 173, 175 (2013)).

Analysis

In the proceedings below, WAH claimed that it was entitled to possession on two bases: alleged lease violations by Roberts and nonpayment of rent in January 2017 and part of February 2017.[4] We address the issues of waiver, the purported lease and subsidy termination, and nonpayment of rent in turn. We then address the remand to the trial court, which relates to Roberts's UDTP claim.

Waiver of lease violations

[1] As to the alleged lease violations, the trial court determined that WAH waived any claim based on the breaches because it accepted rent from Roberts after it knew of the breaches. On the facts presented by this record, that determination was erroneous. Because the trial court did not consider whether Roberts's behavior amounted to material

4. WAH also alleged that Roberts was an improper holdover on an expired lease. However, WAH no longer pursues this claim, and it is unavailing in any case. Under the terms of the lease, which mirror the requirements of federal law, Roberts could only be evicted for specifically enumerated reasons or "other good cause." Otherwise, unless Roberts terminated the lease herself, it would automatically renew at the end of each lease term. As a result, Roberts could not be a "holdover tenant" in the sense that she would be subject to eviction for simply remaining after the expiration of her lease. Without action on her part, the lease would not ordinarily expire.

noncompliance with the lease, we remand for the trial court to take evidence and make appropriate findings. On remand, the parties may still present arguments as to whether any of WAH's conduct after 31 December 2016 constituted a waiver of the alleged violations occurring prior to 3 October 2016, including the presentation to Roberts of the 3 January 2017 document labeled as a lease amendment. However, we hold that a landlord does not, by accepting rents, waive the right to terminate an automatically-renewing lease at the end of the lease term for breaches of the lease where (1) the landlord notifies the tenant of the breaches; (2) the landlord communicates to the tenant that, as a result of the breaches, the landlord will not renew the lease at the end of the then-effective lease term; (3) the landlord accepts rent from the tenant through the end of the then-effective lease term; and (4) non-renewal of the lease is specifically enumerated in the lease as a remedy to the landlord in case of a breach by the tenant.

When a landlord accepts rent from a tenant knowing that the tenant has breached the lease, the acceptance "will ordinarily be treated as an affirmation by him that the contract of lease is still in force, and he is thereby estopped from setting up a breach in any of the conditions of the lease and demanding a forfeiture thereof." *Winder v. Martin*, 183 N.C. 410, 411, 111 S.E. 708, 709 (1922).

> It is the generally accepted rule that if the landlord receive rent from his tenant, after full notice or knowledge of a breach of a covenant or condition in his lease, for which a forfeiture might have been declared, such constitutes a waiver of the forfeiture which may not afterwards be asserted for that particular breach, or any other breach which occurred prior to the acceptance of the rent.

Id. This doctrine of waiver is based "on the ground that the landlord has an election. He may choose whether he will declare the lease at an end and reenter at once, or whether he will overlook the breach and let the lease remain in force." *Id.* (quoting *Palmer v. City Livery Co.*, 98 Wis. 33, 34, 73 N.W. 559, 559 (1897)).

In the ordinary case, where a lease does not by its terms provide for automatic renewal, this proposition is somewhat unremarkable. A landlord faced with a tenant in breach of the lease may either terminate the lease immediately or forgive the breach. If the landlord instead elects not to renew the lease at the end of the lease term, then the landlord has effectively chosen to forgive the breach. This is because, where the lease would terminate anyway, the landlord is under no obligation to

continue to perform upon expiration of the lease—the contractual relationship between the parties dissolves at the end of the lease term. The landlord has not taken advantage of any "right to excuse or repudiate his own performance." *Wachovia Bank & Tr. Co., N. A. v. Rubish*, 306 N.C. 417, 426, 293 S.E.2d 749, 755 (1982). Thus, in the ordinary case of a non-renewing lease, a landlord who knows that a tenant has breached the lease and subsequently accepts rent from the tenant waives any right to assert the breach in court. *See, e.g.*, *Fairchild Realty Co. v. Spiegel, Inc.*, 246 N.C. 458, 468, 98 S.E.2d 871, 878 (1957).

The case is different, however, if the lease would automatically renew at the end of the lease term without a breach by the tenant. In that circumstance, a decision not to renew the lease but also not to pursue immediate eviction does not amount to forgiving the breach. Instead, the landlord has sought to address the tenant's breach by pursuing a remedy specifically laid out in the lease. In this case, the landlord does not have to "choose whether he will declare the lease at an end and reenter at once, or whether he will overlook the breach and let the lease remain in force." *Winder*, 183 N.C. at 411, 111 S.E. at 709. Instead, the lease provides a third option: suspending the lease's automatic renewal provision and ending it at the completion of the lease term. Of course, a landlord cannot make inconsistent elections. For example, once the landlord has chosen the remedy of nonrenewal, the landlord has necessarily elected not to seek immediate eviction and cannot then "declare the lease at an end and reenter at once." *Id.* However, if nonrenewal of a lease is a remedy specified in the lease in case of a tenant's breach, then a landlord's decision not to pursue immediate eviction is not a waiver of the landlord's right to terminate the lease at the end of its term.

The lease agreement between WAH and Roberts automatically renewed each year unless it was terminated pursuant to the lease terms. Under the lease terms, WAH could only terminate the lease for specifically enumerated breaches of the lease or other good cause. Therefore, WAH was required to renew the lease with Roberts unless Roberts breached the lease in one of the ways specifically listed in the lease or established other good cause for the lease's termination. WAH's acceptance of rent and election to terminate the lease at the end of its term, then, could not be a waiver of the breaches to which the termination was intended to respond.

WAH sent a letter to Roberts on 3 October 2016 notifying her that her lease would terminate on 31 December 2016, the end of its then-effective term. The letter specifically stated the lease provisions that WAH believed Roberts had violated and stated specific examples of

how she had violated those terms. Rather than seeking to evict Roberts immediately, WAH gave her almost three months in which to organize her affairs and find alternative housing, or to prepare her defense to eviction, when the lease required notice of, at most, 30 days. On these facts, WAH's acceptance of rent is not a waiver of its right to pursue a remedy specifically contemplated in the lease agreement.

Termination of the lease and subsidy

[2] Roberts's lease and subsidy payments could only be terminated if WAH complied with the applicable federal law. By its terms, the lease agreement required that any termination of the lease by WAH "be carried out in accordance with HUD regulations." Paragraph four of the lease also incorporates "the time frames and administrative procedures set forth in HUD's handbooks, instructions and regulations related to administration of multifamily subsidy programs" as those sources relate to changes in the tenant rent or the subsidy payments. In addition to administrative regulations, federal statutes provide tenants with protections that must be followed. *See*, *e.g.*, 42 U.S.C. § 3544(c)(2)(B) (2018) (prohibiting the termination, denial, suspension, or reduction of public housing benefits unless proper steps are followed). HUD regulations specify how much a tenant can be charged in rent and when a lease can be terminated. *See* 24 C.F.R. § 880.607[5] (2018) (lease termination requirements for Section 8 Housing Assistance Payments for New Construction); *id.* § 5.628 (calculation of total tenant payment from which is derived tenant rent). It is clear, then, that WAH was only entitled to terminate Roberts's subsidy and lease in the event it acted in accordance with federal requirements.

The record contains no findings as to whether WAH complied with federal requirements. The lease between WAH and Roberts specifies many reasons that the lease may be terminated, but only two are relevant on the facts of this case: the lease may be terminated for "[Roberts's] material noncompliance with the terms of" the lease, or it may be terminated "for other good cause." If the trial court determines that WAH did not waive the alleged breaches, the trial court must determine whether the alleged breaches occurred, whether they meet the standards set out in the lease, and whether WAH complied with federal law. Under the terms of the lease itself, WAH may only "rely upon those grounds cited in the termination notice required by" the lease.

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5. It is not entirely clear from the record which specific Section 8 project-based assistance program controlled Ms. Roberts's housing arrangement. However, the programs have similar requirements as they relate to the points discussed in this opinion. In any case, the record would benefit from greater exploration of this issue on remand.

Nonpayment of rent

[3] The trial court entered its judgment, and the Court of Appeals affirmed that judgment, on the basis that Roberts should be evicted for nonpayment of rent for January 2017 and part of February 2017. This conclusion was erroneous.

First, and most straightforwardly, WAH cannot pursue this ground of eviction under the terms of the lease. Under the lease's terms, WAH can only pursue grounds for eviction that are "cited in the termination notice required by" the lease terms. The only such termination notice in the record issued prior to the filing of the summary ejectment action on 5 January 2017 is the notice dated 3 October 2016. That notice stated that the lease was being terminated for "material noncompliance, based on [Roberts's] repeated lease violations which have disrupted the livability of the property, adversely affected the health or safety of residents and staff, the peaceful enjoyment of other residents to the property, and interfered with the management of the property." The notice makes no mention of nonpayment of rent. As a result, without a lease-compliant notice that Roberts failed to pay rent in January 2017 and part of February 2017, it cannot pursue eviction on this basis under the lease.

Second, it is unclear from the record what the basis is for the nonpayment of rent allegation. Under the lease agreement between Roberts and WAH, Roberts paid $139 per month in rent. WAH also received a payment from HUD pursuant to an agreement between WAH and HUD. However, the rent amount paid by Roberts is controlled by paragraph three of the lease agreement between WAH and Roberts. Paragraph four of the lease agreement controls any changes to tenant rent. For example, a change in the tenant's rent requires "at least 30 days advance written notice of any increase" except in certain circumstances, none of which apply to the present case. Further, the lease agreement provides that WAH may change the tenant's "rent or tenant assistance payment only in accordance with the time frames and administrative procedures set forth in HUD's handbooks, instructions and regulations related to administration of multifamily subsidy programs." However, the trial court made no findings of fact as to whether any change in the tenant rent was made consistent with these requirements.

Further, Roberts asserted in her answer to WAH's amended complaint that she tendered rent in the amount of $139 in January of 2017, and that the tender was rejected by WAH's property manager. WAH admitted in its reply that it refused Roberts's offer of payment. Whether Roberts tendered her rental payment and WAH refused the offer is relevant to

determining whether the landlord can evict for non-payment of rent. *See* N.C.G.S. § 42-33 (2019); *Hoover v. Crotts*, 232 N.C. 617, 618, 61 S.E.2d 705, 706 (1950) (where tenant tenders rent due and landlord declines to accept, landlord may not take possession for nonpayment of rent).

Roberts began paying a rent bond of $532 per month beginning in mid-February of 2017. On the record before us, it appears that she has made the payments consistently every month. If there was no change to tenant rent made consistent with the terms of the lease, then Roberts's rent under the lease remained $139 per month. Therefore, Roberts would have more than satisfied any past-due rent owed by April of 2017 at the latest. On the other hand, if the rent owed by Roberts was effectively and properly changed to $532 per month, then Roberts would not have already paid the rent owed for January 2017 and part of February 2017.

As a result, findings of fact are necessary as to WAH's actions regarding the termination of Roberts's subsidy payments and related increase in her required rental payments, and whether the lease terms and federal law were followed. As these findings will necessarily bear on Roberts's UDTP counterclaim, that counterclaim would need to be reconsidered in light of these findings.

Conclusion

The Court of Appeals is reversed for the reasons explained above. The case is remanded to the Court of Appeals for further remand to the District Court, Forsyth County, for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Justice DAVIS did not participate in the consideration or decision of this case.

Justice NEWBY concurring in part and dissenting in part.

I concur with the majority's ultimate holding in this case that the landlord did not, by accepting rents during the notice period, waive the right to evict the tenant for violations of the lease agreement. I disagree with the majority's conclusion regarding the viability of the tenant's unfair and deceptive trade practices (UDTP) claim. Instead, I agree with the determination of the Court of Appeals that the tenant has alleged no injury and therefore cannot legally proceed on a UDTP claim. On this issue, I respectfully dissent.

The district court concluded that the tenant did not present sufficient evidence to establish a UDTP claim based on the termination of her rental subsidy. The Court of Appeals affirmed the trial court, concluding that the tenant presented "insufficient evidence in this case of an injury proximately caused by the alleged act or practice" and thus failed to prove her claim. *Winston Affordable Housing, LLC v. Roberts*, No. COA18-553, 2019 WL 2510879 at *4 (N.C. Ct. App. June 18, 2019) (unpublished). The Court of Appeals correctly affirmed the trial court's dismissal of the tenant's UDTP claim.

> We review a dismissal under Rule 12(b)(6) de novo, "view[ing] the allegations as true and . . . in the light most favorable to the non-moving party." *Kirby v. N.C. DOT*, 368 N.C. 847, 852, 786 S.E.2d 919, 923 (2016) (quoting *Mangum v. Raleigh Bd. of Adjust.*, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008)). Dismissal is proper when the complaint "fail[s] to state a claim upon which relief can be granted." *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 448, 781 S.E.2d 1, 7 (2015) (alteration in original) (quoting N.C.G.S. § 1A-1, Rule 12(b)(6) (2013)). "When the complaint on its face reveals that no law supports the claim . . . or discloses facts that necessarily defeat the claim, dismissal is proper." *Id.* at 448, 781 S.E.2d at 8 (citing *Wood v. Guilford County*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002)).

Christenbury Eye Ctr., P.A. v. Medflow, Inc., 370 N.C. 1, 5, 802 S.E.2d 888, 891 (2017) (alterations in original).

"Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." N.C.G.S. § 75.1.1(a) (2019). "In order to establish a prima facie claim for unfair trade practices, a plaintiff must show: (1) [the] defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Bumpers v. Cmty. Bank of N. Virginia*, 367 N.C. 81, 88, 747 S.E.2d 220, 226 (2013) (alterations in original) (quoting *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001)). Here, even if we assume the landlord committed an unfair and deceptive trade practice, the tenant is unable to show that the action caused injury. Therefore, dismissal is proper.

The tenant has continuously remained in the apartment; thus, she has not been injured by eviction. Based on the evidence presented, the

magistrate set the amount of rent at the market rate of the apartment with the money to be paid to the clerk of court, and the district court denied the tenant's motion to reduce it. The tenant began making those payments beginning 24 February 2017. If, on remand, the trial court determines that the rent bond amount exceeds the actual rent she owed, the money will be returned. Therefore, the trial court properly dismissed the UDTP claim for failing to allege an injury. I respectfully dissent.

DELLINGER v. LINCOLN CTY.

[374 N.C. 411 (2020)]

GARY DELLINGER, VIRGINIA DELLINGER AND TIMOTHY S. DELLINGER	)	
v.	)	LINCOLN COUNTY
LINCOLN COUNTY, LINCOLN COUNTY BOARD OF COMMISSIONERS, AND STRATA SOLAR, LLC,	)	
and	)	
MARK MORGAN, BRIDGETTE MORGAN, TIMOTHY MOONEY, NADINE MOONEY, ANDREW SCHOTT, WENDY SCHOTT, ROBERT BONNER, MICHELLE BONNER, JEFFREY DELC, LISA DELUCA, MARTHA MCLEAN, CHARLEEN MONTGOMERY, ROBERT MONTGOMERY, DAVID WARD, INTERVENORS	)	

No. 321P19

ORDER

Intervenors' petition for discretionary review is decided as follows: The Court allows the Intervenors' petition for discretionary review for the limited purpose of remanding this case to the Court of Appeals for further consideration in light of this Court's decision in PHG Asheville, LLC v. City of Asheville, No. 434PA18 (N.C. Apr. 3, 2020). Intervenors' Petition for Writ of Supersedeas is allowed.

By Order of the Court in Conference, this 29th day of April 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of May 2020.

AMY FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk
~~Assistant~~ Clerk

DTH MEDIA CORPORATION, CAPITOL BROADCASTING COMPANY, INC., THE CHARLOTTE OBSERVER PUBLISHING COMPANY, AND THE DURHAM HERALD COMPANY	)	
v.	)	From Wake County
CAROL L. FOLT, IN HER OFFICIAL CAPACITY AS CHANCELLOR OF THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, AND GAVIN YOUNG, IN HIS OFFICIAL CAPACITY AS SENIOR DIRECTOR OF PUBLIC RECORDS FOR THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL	)	

No. 142PA18

ORDER

The Court hereby allows a limited temporary stay of issuance of its mandate in this case until such time as the Supreme Court of the United States rules on a motion for a stay, provided defendant-appellants file such motion with that Court within twenty-one days of the date of this Order. Defendant-appellants' application to stay issuance of the mandate is otherwise denied.

By Order of the Court in Conference, this 20th day of May, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 20th day of May, 2020.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/Amy L. Funderburk
Clerk

JOHNSTON CTY. BD. OF EDUC. v. BD. OF TRS., TEACHERS' AND STATE EMPS.' RET. SYS.

[374 N.C. 413 (2020)]

JOHNSTON COUNTY BOARD OF EDUCATION	)	
v.	)	WAKE COUNTY
BOARD OF TRUSTEES, TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM; DALE R. FOLWELL, STATE TREASURER (IN OFFICIAL CAPACITY ONLY); STEVEN C. TOOLE, DIRECTOR, RETIREMENT SYSTEMS DIVISION (IN OFFICIAL CAPACITY ONLY)	)	

No. 376P18

ORDER

The State's petition for discretionary review is decided as follows: The Court allows the State's petition for discretionary review for the limited purpose of remanding this case to the Court of Appeals for further consideration in light of this Court's decisions in Cabarrus Cty. Bd. of Educ. v. Dep't of State Treasurer, No. 369PA18 (N.C. Apr. 3, 2020), and Cabarrus Cty. Bd. of Educ. v. Bd. of Trs. Teachers' and State Emps.' Ret. Sys., No. 371PA18 (N.C. Apr. 3, 2020).

By Order of the Court in Conference, this 29th day of April 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of May 2020.

AMY FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk
~~Assistant~~ Clerk

JOHNSTON COUNTY BOARD OF EDUCATION	)	
v.	)	WAKE COUNTY
DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION; DALE R. FOLWELL, STATE TREASURER (IN OFFICIAL CAPACITY ONLY); STEVEN C. TOOLE, DIRECTOR, RETIREMENT SYSTEMS DIVISION (IN OFFICIAL CAPACITY ONLY)	)	

No. 373P18

ORDER

The State's petition for discretionary review is decided as follows: The Court allows the State's petition for discretionary review for the limited purpose of remanding this case to the Court of Appeals for further consideration in light of this Court's decisions in Cabarrus Cty. Bd. of Educ. v. Dep't of State Treasurer, No. 369PA18 (N.C. Apr. 3, 2020), and Cabarrus Cty. Bd. of Educ. v. Bd. of Trs. Teachers' and State Emps.' Ret. Sys., No. 371PA18 (N.C. Apr. 3, 2020).

By Order of the Court in Conference, this 29th day of April 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of May 2020.

AMY FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk
~~Assistant~~ Clerk

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, DISABILITY RIGHTS NORTH CAROLINA, AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA LEGAL FOUNDATION, ALBERTA ELAINE WHITE, KIM T. CALDWELL, JOHN E. STURDIVANT, SANDARA KAY DOWELL, AND CHRISTINA RHODES	)	
v.	)	WAKE COUNTY
ROY COOPER, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF NORTH CAROLINA; AND ERIK A. HOOKS, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY	)	

No. 160P20

ORDER

Upon consideration of the petitioners' Motion to Expedite Response to Petition for *Writ of Mandamus* filed by petitioners on the 8th day of April, 2020, and given that the parties agree with the schedule proposed by respondents, the Court allows the Motion to Expedite Response to Petition for *Writ of Mandamus*. Accordingly, the respondents' response shall be filed by noon on 13 April 2020; and the petitioners' reply to respondents' response shall be filed by 5:00 pm on 15 April 2020. In addition, Amicus briefs should be filed by 5:00 pm on 15 April 2020.

By Order of the Court in Conference, this 9th day of April 2020.

s/Earls, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 9th day of April 2020.

AMY FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk
Clerk

STATE v. BEAL

[374 N.C. 416 (2020)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Lincoln County
	)	
REGGIE JOE BEAL	)	

No. 104P20

ORDER

Defendant's Petition for Writ of Certiorari to Review Order of Court of Appeals is allowed for the limited purpose of remanding the matter to the Court of Appeals for a determination of the case on its merits.

By order of the Court in Conference, this 29th day of April, 2020.

Ervin, J. recused.

s/ Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of May, 2020.

AMY L. FUNDERBURK

s/Amy L. Funderburk
Clerk of the Supreme Court

STATE v. BELL

[374 N.C. 417 (2020)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Onslow County
	)	
BRYAN CHRISTOPHER BELL	)	

No. 86A02-2

ORDER

The State's Motion to Hold Defendant's Petition for Writ of Certiorari Prematurely Filed in Violation of this Court's Order Dated 25 January 2013 is denied. The State shall have thirty days from the date upon which the Chief Justice's emergency order extending filing deadlines expires in which to file its response to defendant's petition for writ of certiorari.

By Order of the Court in Conference, this 29th day of April, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of May, 2020.

AMY FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk
~~Assistant~~ Clerk

STATE v. WYNN

[374 N.C. 418 (2020)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Dare County
	)	
GREGORY JEROME WYNN, JR.	)	

No. 126P19

ORDER

Defendant's petition for discretionary review and motion in the alternative to remand are decided as follows: The Court allows defendant's petition for the limited purpose of remanding this case to the Court of Appeals for further consideration in light of this Court's decision in *State v. Golder*, No. 79PA18 (N.C. Apr. 3, 2020). Defendant's motion to amend his petition for discretionary review is dismissed as moot.

By Order of the Court in Conference, this 29th day of April, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of May, 2020.

AMY FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk
~~Assistant~~ Clerk

UNION COUNTY BOARD OF EDUCATION	)	
v.	)	WAKE COUNTY
BOARD OF TRUSTEES, TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM; DALE R. FOLWELL, STATE TREASURER (IN OFFICIAL CAPACITY ONLY); STEVEN C. TOOLE, DIRECTOR, RETIREMENT SYSTEMS DIVISION (IN OFFICIAL CAPACITY ONLY)	)	

No. 375P18

ORDER

The State's petition for discretionary review is decided as follows: The Court allows the State's petition for discretionary review for the limited purpose of remanding this case to the Court of Appeals for further consideration in light of this Court's decisions in Cabarrus Cty. Bd. of Educ. v. Dep't of State Treasurer, No. 369PA18 (N.C. Apr. 3, 2020), and Cabarrus Cty. Bd. of Educ. v. Bd. of Trs. Teachers' and State Emps.' Ret. Sys., No. 371PA18 (N.C. Apr. 3, 2020).

By Order of the Court in Conference, this 29th day of April 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of May 2020.

AMY FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk
~~Assistant~~ Clerk

UNION COUNTY BOARD OF EDUCATION	)	
v.	)	WAKE COUNTY
DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION; DALE R. FOLWELL, STATE TREASURER (IN OFFICIAL CAPACITY ONLY); STEVEN C. TOOLE, DIRECTOR, RETIREMENT SYSTEMS DIVISION (IN OFFICIAL CAPACITY ONLY)	)	

No. 374P18

ORDER

The State's petition for discretionary review is decided as follows: The Court allows the State's petition for discretionary review for the limited purpose of remanding this case to the Court of Appeals for further consideration in light of this Court's decisions in Cabarrus Cty. Bd. of Educ. v. Dep't of State Treasurer, No. 369PA18 (N.C. Apr. 3, 2020), and Cabarrus Cty. Bd. of Educ. v. Bd. of Trs. Teachers' and State Emps.' Ret. Sys., No. 371PA18 (N.C. Apr. 3, 2020).

By Order of the Court in Conference, this 29th day of April 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of May 2020.

AMY FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk
~~Assistant~~ Clerk

WILKES COUNTY BOARD OF EDUCATION	)	
v.	)	WAKE COUNTY
BOARD OF TRUSTEES, TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM; DALE R. FOLWELL, STATE TREASURER (IN OFFICIAL CAPACITY ONLY); STEVEN C. TOOLE, DIRECTOR, RETIREMENT SYSTEMS DIVISION (IN OFFICIAL CAPACITY ONLY)	)	

No. 370P18

ORDER

The State's petition for discretionary review is decided as follows: The Court allows the State's petition for discretionary review for the limited purpose of remanding this case to the Court of Appeals for further consideration in light of this Court's decisions in Cabarrus Cty. Bd. of Educ. v. Dep't of State Treasurer, No. 369PA18 (N.C. Apr. 3, 2020), and Cabarrus Cty. Bd. of Educ. v. Bd. of Trs. Teachers' and State Emps.' Ret. Sys., No. 371PA18 (N.C. Apr. 3, 2020).

By Order of the Court in Conference, this 29th day of April 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of May 2020.

AMY FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk
~~Assistant~~ Clerk

WILKES COUNTY BOARD OF EDUCATION	)	
v.	)	WAKE COUNTY
DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION; DALE R. FOLWELL, STATE TREASURER (IN OFFICIAL CAPACITY ONLY); STEVEN C. TOOLE, DIRECTOR, RETIREMENT SYSTEMS DIVISION (IN OFFICIAL CAPACITY ONLY)	)	

No. 372P18

ORDER

The State's petition for discretionary review is decided as follows: The Court allows the State's petition for discretionary review for the limited purpose of remanding this case to the Court of Appeals for further consideration in light of this Court's decisions in Cabarrus Cty. Bd. of Educ. v. Dep't of State Treasurer, No. 369PA18 (N.C. Apr. 3, 2020), and Cabarrus Cty. Bd. of Educ. v. Bd. of Trs. Teachers' and State Emps.' Ret. Sys., No. 371PA18 (N.C. Apr. 3, 2020).

By Order of the Court in Conference, this 29th day of April 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of May 2020.

AMY FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk
~~Assistant~~ Clerk

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

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5P20	State v. Rocky Dustin Nance	Def's PDR Under N.C.G.S. § 7A-31	Denied
29A20	Stacy Griffin, Employee v. Absolute Fire Control, Employer, Everest National Ins. Co. & Gallagher Bassett Servs., Carrier	1. Defs' Notice of Appeal Based Upon a Dissent 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Defs' Conditional PDR Under N.C.G.S. § 7A-31	1. --- 2. Allowed 3. Allowed
36P20	State v. Bartholomew R. Scott	1. Def's Notice of Appeal Based Upon a Constitutional Question 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
47P20	State v. Anthony Dewan Moore	Def's PDR Under N.C.G.S. § 7A-31	Denied
48P20	State v. Lyneil Antonio Washington, Jr.	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **02/06/2020** Dissolved **04/29/2020** 2. Denied 3. Denied
51P20	Sarah E. Riopelle (Cooper), Plaintiff v. Jason B. Riopelle, Defendant v. Lindsey and Avery Fuller, Intervenors	1. Def's Pro Se Motion for Temporary Stay 2. Def's Pro Se Petition for Writ of Supersedeas 3. Def's Pro Se Petition for Writ of Certiorari to Review Decision of the COA	1. Denied **02/10/2020** 2. Denied 3. Denied
54A19-3	State v. Rogelio Albino Diaz-Tomas	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas	1. Allowed **04/21/2020** 2.

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61P20	Crop Production Services, Inc., Plaintiff v. Matthew C. Pearson and Helen F. Pearson, Defendants and Third-Party Plaintiffs v. Perdue Agribusiness LLC, d/b/a Perdue-Agrirecycle, and Perdue-Agrirecycle, LLC, Third-Party Defendants	1. Defs' Notice of Appeal Based Upon a Constitutional Question 2. Defs' PDR Under N.C.G.S. § 7A-31 3. Third Party Def's (Perdue) Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
69P18-3	State v. Nell Monette Baldwin	1. Def's Pro Se Motion to Proceed Without Prepaying Costs 2. Def's Pro Se Motion to Consolidate the Civil Case and Criminal Case 3. Def's Pro Se Motion for an Order of Judicial Notice 4. Def's Pro Se Motion to Disqualify Opposing Counsel 5. Def's Pro Se Motion for Judicial Disciplinary Action 6. Def's Pro Se Motion for Discretionary Review 7. Def's Pro Se Motion in the Alternative for Petition for Writ of Certiorari (Civil and Criminal) 8. Def's Pro Se Motion for Appropriate Relief	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed 5. Dismissed 6. Dismissed 7. Dismissed 8. Dismissed **Beasley, C.J., recused** **Morgan, J., recused**
72P20	Cynthia Clark, Employee v. US Airways, Inc., Employer, American Insurance Group Plan, Carrier (Sedgwick CMS, Third-Party Administrator)	Plt's PDR Under N.C.G.S. § 7A-31	Denied
81P20	State v. Tamika Latonya Horne	Def's PDR Under N.C.G.S. § 7A-31	Denied

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82P20	Debbie Thompson Hampton; as Executrix of the Estate of Delacy Beatrice Thompson Miles, Deceased v. Andrew Taylor Hearn, M.D.	Plt's PDR Under N.C.G.S. § 7A-31	Denied
83P20	State v. Jerry Leon Phifer	Def's PDR Under N.C.G.S. § 7A-31	Denied
86A02-2	State v. Bryan Christopher Bell	1. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Onslow County 2. State's Motion to Hold Defendant's Petition for Writ of Certiorari Prematurely Filed in Violation of this Court's Order Dated 25 January 2013	1. 2. Special Order
90P20	Kristen Martin v. Hillary Irwin and Erinviene Holdings, LLC	Plt's PDR Under N.C.G.S. § 7A-31	Denied
101P20	Necus A. Jackson, Employee v. General Electric Company, Employer and Electric Insurance Company, Carrier	1. Plt's Pro Se Motion for Notice of Appeal 2. Plt's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Motion to Dismiss Appeal	1. --- 2. Allowed 3. Allowed
102P20	Chester Taylor, III, Ronda and Brian Warlick, Lori Mendez, Lori Martinez, Crystal Price, Jeanette and Andrew Aleshire, Marquita Perry, Whitney Whiteside, Kimberly Stephan, Keith Peacock, Zelmon McBride v. Bank of America, N.A.	Plts' PDR Prior to a Determination by the COA	Denied
104P20	State v. Reggie Joe Beal	Def's Petition for Writ of Certiorari to Review Order of the COA	Special Order **Ervin, J., recused**

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107P20	Lennar Carolinas, LLC v. County of Union	1. Def's PDR Under N.C.G.S. § 7A-31 2. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Union County	1. Denied 2. Denied
108P20	True Homes, LLC v. County of Union	1. Def's PDR Under N.C.G.S. § 7A-31 2. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Union County	1. Denied 2. Denied
109P20	Shea Homes, LLC, et al. v. County of Union	1. Def's PDR Under N.C.G.S. § 7A-31 2. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Union County	1. Denied 2. Denied
110P20	Shops at Chestnut, LLC v. County of Union	1. Def's PDR Under N.C.G.S. § 7A-31 2. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Union County	1. Denied 2. Denied
111P20	M/I Homes of Charlotte, LLC v. County of Union	1. Def's PDR Under N.C.G.S. § 7A-31 2. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Union County	1. Denied 2. Denied
112P20	Calatlantic Group, Inc., et al. v. County of Union	1. Def's PDR Under N.C.G.S. § 7A-31 2. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Union County	1. Denied 2. Denied
113P20	McInnis Construction Co., et al. v. County of Union	1. Def's PDR Under N.C.G.S. § 7A-31 2. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Union County	1. Denied 2. Denied
114P20	Eastwood Construction Co., Inc., et al. v. County of Union	1. Def's PDR Under N.C.G.S. § 7A-31 2. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Union County	1. Denied 2. Denied
115P20	Pace/Dowd Properties LTD., et al. v. County of Union	1. Def's PDR Under N.C.G.S. § 7A-31 2. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Union County	1. Denied 2. Denied
118P20	Joseph L. Carrington, Jr. v. Carolina Day School, Inc.	Plt's PDR Under N.C.G.S. § 7A-31	Denied

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124P20	State v. Donovan Burney	Def's Pro Se Motion to Appoint Counsel	Dismissed **04/06/2020**
125P20	State v. Alexander Asanov	1. Def's Petition for Writ of Certiorari to Review Order of the COA 2. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Wake County 3. Def's Petition for Writ of Certiorari to Review Decision of District Court, Wake County	1. Dismissed 2. Dismissed 3. Dismissed
126P19	State v. Gregory Jerome Wynn, Jr.	1. Def's PDR Under N.C.G.S. § 7A-31 2. Def's Motion to Amend PDR Under N.C.G.S. § 7A-31 3. Def's Motion in the Alternative to Remand	1. Special Order 2. Special Order 3. Special Order
128A20	James Rickenbaugh and Mary Rickenbaugh, Husband and Wife, Individually and on Behalf of All Others Similarly Situated v. Power Home Solar, LLC, a Delaware Limited Liability Company	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas	1. Allowed **03/20/2020** 2. Allowed **04/03/2020**
131P20	State v. Kevin Lamonte White	Def's Pro Se PDR Under N.C.G.S. § 7A-31	Denied
143P20-2	Henderson v. Vaughn	1. Petitioner's Pro Se Petition for Writ of Habeas Corpus 2. Petitioner's Pro Se Motion for Order to Show Cause and to Prove Personal and Subject Matter Jurisdiction	1. Denied **04/06/2020** 2. Dismissed **04/06/2020** **Ervin, J., recused**
143P20-3	Henderson v. Vaughn	Petitioner's Pro Se Motion for PDR	Denied **04/14/2020** **Ervin, J., recused**
146P20	State v. Charles Edgerton	Def's Pro Se Motion to Appeal	Dismissed *ex mero motu*

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147P20	Nathan Nathaniel v. State of North Carolina, Vance County District Court	Petitioner's Pro Se Petition for Writ of Mandamus	Dismissed
148P20	In re James Wilson	Petitioner's Pro Se Petition for Writ of Certiorari to Review Order of the COA	Denied
155P20	State v. John D. Graham	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas	1. Allowed **04/03/2020** 2.
156P20	State v. David Warren Taylor	1. State's Motion for a Temporary Stay 2. State's Petition for a Writ of Supersedeas	1. Allowed **04/07/2020** 2.
160P20	North Carolina State Conference of the NAACP, Disability Rights North Carolina, American Civil Liberties Union of North Carolina Legal Foundation, Alberta Elaine White, Kim T. Caldwell, John E. Sturdivant, Sandara Kay Dowell, and Christina Rhodes v. Roy Cooper, in his official capacity as Governor of North Carolina; and Erik A. Hooks, in his official capacity as Secretary of the North Carolina Department of Public Safety	1. Petitioners' Emergency Petition for Writ of Mandamus 2. Petitioners' Motion to Expedite Response to Petition for Writ of Mandamus 3. North Carolina Justice Center's Motion for Leave to File Amicus Brief 4. Petitioners' Motion to Substitute Corrected Affidavit	1. Dismissed Without Prejudice **04/17/2020** 2. Special Order **04/09/2020** 3. Allowed **04/15/2020** 4. Allowed **04/17/2020**
163P20	State v. Wilmer de Jesus Cruz	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas 3. Def's Petition for Writ of Mandamus 4. Def's Petition for Writ of Certiorari to Review Order of District Court, Lee County	1. Denied **04/15/2020** 2. Denied **04/15/2020** 3. Dismissed **04/15/2020** 4. Dismissed **04/15/2020**

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164P20	State v. Wilmer de Jesus Cruz	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas 3. Def's Petition for Writ of Certiorari to Review Order of the COA 4. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Hoke County	1. Denied **04/15/2020** 2. Denied **04/15/2020** 3. Denied **04/15/2020** 4. Denied **04/15/2020**
184A20	State v. Fabiola Rosales Chavez	1. State's Motion for Temporary Stay 2. State's Petition for Writ of Supersedeas	1. Allowed **04/24/2020** 2.
218P19	Wanda Stathum-Ward v. Wal-Mart Stores, Inc. d/b/a Wal-Mart Supercenter Store #5254; Wal-Mart Real Estate Business Trust; Wal-Mart Stores East, LP; Wal-Mart Stores East, Inc.; Wal-Mart Louisiana, LLC; and Wal-Mart Stores Texas, LLC	Plt's PDR Under N.C.G.S. § 7A-31	Denied
219P17-3	Courtney NC, LLC d/b/a Oakwood Raleigh at Brier Creek v. Monette Baldwin a/k/a Nell Monette Baldwin	1. Def's Pro Se Motion to Proceed Without Prepaying Costs 2. Def's Pro Se Motion to Consolidate the Civil Case and Criminal Case 3. Def's Pro Se Motion for an Order of Judicial Notice 4. Def's Pro Se Motion to Disqualify Opposing Counsel 5. Def's Pro Se Motion for Judicial Disciplinary Action 6. Def's Pro Se Motion for Discretionary Review 7. Def's Pro Se Motion in the Alternative for Petition for Writ of Certiorari (Civil and Criminal) 8. Def's Pro Se Motion for Appropriate Relief	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed 5. Dismissed 6. Dismissed 7. Dismissed 8. Dismissed **Beasley, C.J., recused** **Morgan, J., recused**

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306P18-2	Hunter F. Grodner v. Andrzej Grodner (now Andrew Grodner)	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA 2. Def's Pro Se Motion for Temporary Suspension of N.C.R.A.P. Rule 11 Pending Review of Petition for Writ of Certiorari 3. Def's Pro Se Motion of Expedited Review 4. Plt's Motion to Tax Costs and Attorney Fees 5. Def's Pro Se Motion to Disqualify Opposing Counsel	1. Denied 2. Dismissed as moot 3. Dismissed as moot 4. Denied 5. Dismissed as moot
312P18-2	State v. Aaron Lee Gordon	1. State's Motion for Temporary Stay 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/02/2020** 2. 3.
321P19	Gary Dellinger, Virginia Dellinger, and Timothy S. Dellinger v. Lincoln County, Lincoln County Board of Commissioners, and Strata Solar, LLC and Mark Morgan, Bridgette Morgan, Timothy Mooney, Nadine Mooney, Andrew Schott, Wendy Schott, Robert Bonner, Michelle Bonner, Jeffrey Deluca, Lisa Deluca, Martha McLean, Charleen Montgomery, Robert Montgomery, David Ward, Intervenors	1. Intervenors' Motion for Temporary Stay 2. Intervenors' Petition for Writ of Supersedeas 3. Intervenors' PDR Under N.C.G.S. § 7A-31	1. Allowed **08/16/2019** 2. Special Order 3. Special Order
339A19	In the Matter of D.M., M.M., D.M.	1. Petitioner and Guardian *ad Litem*'s Motion to Dismiss Appeal 2. Petitioner and GAL's Motion for Guidance Concerning Petition for Writ of Certiorari	1. Dismissed **04/06/2020** 2. Denied **04/06/2020**

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370P18	Wilkes County Board of Education v. Board of Trustees, Teachers' and State Employees' Retirement System; Dale R. Folwell, State Treasurer (in official capacity only); Steven C. Toole, Director, Retirement Systems Division (in official capacity only)	1. Respondents' PDR Under N.C.G.S. § 7A-31 2. Respondent's Motion to Withdraw as Counsel of Record	1. Special Order 2. Allowed **03/30/2020**
372P18	Wilkes County Board of Education v. Department of State Treasurer, Retirement Systems Division; Dale R. Folwell, State Treasurer (in official capacity only); Steven C. Toole, Director, Retirement Systems Division (in official capacity only)	1. Respondents' PDR Under N.C.G.S. § 7A-31 2. Respondent's Motion to Withdraw as Counsel of Record	1. Special Order 2. Allowed **03/30/2020**
373P18	Johnston County Board of Education v. Department of State Treasurer, Retirement Systems Division; Dale R. Folwell, State Treasurer (in official capacity only); Steven C. Toole, Director, Retirement Systems Division (in official capacity only)	1. Respondents' PDR Under N.C.G.S. § 7A-31 2. Respondent's Motion to Withdraw as Counsel of Record	1. Special Order 2. Allowed **03/30/2020**

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374P18	Union County Board of Education v. Department of State Treasurer, Retirement Systems Division; Dale R. Folwell, State Treasurer (in official capacity only); Steven C. Toole, Director, Retirement Systems Division (in official capacity only)	1. Respondents' PDR Under N.C.G.S. § 7A-31 2. Respondent's Motion to Withdraw as Counsel of Record	1. Special Order 2. Allowed **03/30/2020**
375P18	Union County Board of Education v. Board of Trustees, Teachers' and State Employees' Retirement System; Dale R. Folwell, State Treasurer (in official capacity only); Steven C. Toole, Director, Retirement Systems Division (in official capacity only)	1. Respondents' PDR Under N.C.G.S. § 7A-31 2. Respondent's Motion to Withdraw as Counsel of Record	1. Special Order 2. Allowed **03/30/2020**
376P18	Johnston County Board of Education v. Board of Trustees, Teachers' and State Employees' Retirement System; Dale R. Folwell, State Treasurer (in official capacity only); Steven C. Toole, Director, Retirement Systems Division (in official capacity only)	1. Respondents' PDR Under N.C.G.S. § 7A-31 2. Respondent's Motion to Withdraw as Counsel of Record	1. Special Order 2. Allowed **03/30/2020**
378P18-6	State v. Napier Sandford Fuller	Def's Pro Se Motion for Disability Access Policy	Dismissed as moot
384P19	State v. Shenika Chennel Shamberger	Def's PDR Under N.C.G.S. § 7A-31	Denied

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385P19	Raleigh Housing Authority v. Patricia Winston	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **10/04/2019** 2. Allowed 3. Allowed **Davis, J., recused**
387P19	State v. Larry McCann	Def's PDR Under N.C.G.S. § 7A-31	Denied
399P19	State v. Stevenson Gulberto Trice	Def's PDR Under N.C.G.S. § 7A-31	Denied
410P19	In the Matter of K.J.	Respondent's PDR Under N.C.G.S. § 7A-31	Denied
414A19	Lisa Gurkin, as Executrix for the Estate of Robert Gurkin and the Estate of Robert Gurkin v. Robert Thomas Sofield, Jr.; Equity Investments Associates, LLC; Southeast Property Acquisitions, LLC f/k/a Appalachian Property Holdings, LLC; Carolina Forests, LLC; Appalachian Property Holdings, LLC; Pine Forest Development Company, LLC; SPG Property, LLC; GPS Holdings, LLC; Sofield Holdings Management, Inc.; RTS-DMC 1, LLC; HS Green Family Irrevocable Trust; HS Portante Family Irrevocable Trust; and RT Sofield III Irrevocable Trust	1. Defs' Motion to Dismiss Appeal 2. Plts' Motion for Extension of Time to Respond to Motion to Dismiss Appeal 3. Plts' Motion to Supplement the Record on Appeal 4. Plts' Amended Motion to Supplement the Record	1. Allowed 2. Allowed **02/26/2020** 3. Dismissed as moot 4. Denied
419P19	Lisa A. Garrett, Employee v. The Goodyear Tire & Rubber Co., Employer, Liberty Mutual Insurance Company, Carrier	Plt's PDR Under N.C.G.S. § 7A-31	Denied

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423P19	In Re Moorehead I, LLC, Foreclosure of that Deed of Trust Dated March 8, 2007, Recorded in Book 7393 at Page 19, Cabarrus County Registry, Under Foreclosure by H.L. Ruth, III, Substitute Trustee	Intervenors' PDR Under N.C.G.S. § 7A-31	Denied
435P19	State v. Joseph Odell Spencer	Def's Pro Se PDR Under N.C.G.S. § 7A-31	Denied
444P19	State v. Garry Joseph Gupton	1. Def's PDR Under N.C.G.S. § 7A-31 2. State's Motion to Dismiss Request for Discretionary Review	1. Denied 2. Dismissed as moot
465P19	State v. Christopher Willis Jenkins	Def's PDR Under N.C.G.S. § 7A-31	Denied
466P19	Jorge Macias, Employee v. BSI Associates, Inc. d/b/a Carolina Chimney, Employer, Travelers Insurance Company, Carrier	1. Defs' Motion for Temporary Stay 2. Defs' Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed **12/10/2019** Dissolved **04/29/2020** 2. Denied 3. Denied **Davis, J., recused**
470A19	U.S. Bank National Association, as Trustee for the Holders of the Sami II Inc., Bear Sterns Arm Trust, Mortgage Pass-Through Certificates, Series 2005-12 v. Estate of John G. Wood, III a/k/a John G. Wood, Jr., Annette F. Wood, Edward W. Wood, and Mary G. Wood	1. Def's (Mary G. Wood) Notice of Appeal Based Upon a Dissent 2. Def's (Mary G. Wood) Motion to Dismiss Appeal	1. --- 2. Allowed **04/20/2020**
481P13-2	State v. Danny Lamont Thomas	Def's PDR Under N.C.G.S. § 7A-31	Denied

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485P19	State v. Cashaun K. Harvin	1. State's Motion for Temporary Stay	1. Allowed **12/20/2019**
		2. State's Petition for Writ of Supersedeas	2. Allowed
		3. Def's Motion to Lift the Stay	3. Denied
		4. State's Motion to Maintain the Stay	4. Allowed
		5. State's Petition for Writ of Certiorari to Review Decision of the COA	5. Allowed
		6. State's Second Petition for Writ of Certiorari to Review Decision of the COA	6. Denied
542P11-3	State v. Jeffrey Harliss Freeman	Def's Pro Se Motion for PDR Under N.C.G.S. § 7A-31	Dismissed **Ervin, J., recused**

COMMERCIAL PRINTING COMPANY
PRINTERS TO THE SUPREME COURT AND THE COURT OF APPEALS